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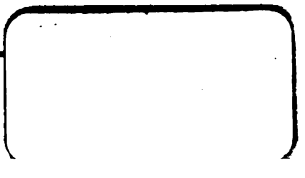

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MASSACHUSETTS REPORTS.

126

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

NOVEMBER, 1878 — MAY, 1879

JOHN LATHROP

REPORTER

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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ATTORNEYS GENERAL.

HON. CHARLES R. TRAIN.
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

WALTER FARNSWORTH & another *vs.* CITY OF BOSTON.

Suffolk. March 6. — Nov. 25, 1878. COLT & SOULE, JJ., absent.

Under the St. of 1873, *c.* 340, obliging the city of Boston to take certain lands to abate a nuisance, and providing that any person, whose land is taken, may apply for a jury, by petition to the Superior Court, to assess his damages, a mortgagee of land so taken, who is out of possession, has not such an interest in the land as to entitle him to join with the owner of the equity of redemption in the petition for a jury.

PETITION to the Superior Court, filed originally by Walter Farnsworth alone, on December 18, 1876, for a jury to assess damages, for the taking by the respondent of a parcel of land in Boston, under the St. of 1873, *c.* 340.

On December 20, 1876, the Union Institution for Savings, which held a mortgage on the petitioner's land, dated June 2, 1871, and then due, filed, in the Superior Court, a petition setting forth its interest as mortgagee, and praying that it might join as a party in the petition filed by Farnsworth; and the court, against the respondent's objection, allowed this to be done.

At the trial in the Superior Court, before *Putnam*, J., it appeared that on September 1, 1873, the board of aldermen of the city of Boston passed an order establishing the grade of the

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Northampton Street District, so called, in Boston, in which the petitioner's land was situated, in order to secure complete drainage, to prevent nuisances and to preserve the public health of the city; and on September 5, 1873, an order, passed by the city council, directing the owners of lands in the said district to raise the grade of their lands, was approved by the mayor.

The city entered upon the lands, raised the grade thereof, and assessed the cost thereof to the owners; and on March 8, 1875, the petitioner notified the city that he was dissatisfied with the assessment on his land, and offered to surrender his estate to the city. In November 1876, the city council passed an order taking the petitioner's land, which was approved by the mayor, and was recorded in the Suffolk registry of deeds on December 1, 1876; and Farnsworth, not agreeing with the city upon the damage done to him by such taking, filed this petition.

Farnsworth and the mortgagee agreed that the amount due upon the mortgage at the time of trial was $131,000.

The judge instructed the jury, if they should find the value of the land to exceed $131,000, to find for the Union Institution for Savings in the sum of $131,000, and for Farnsworth any excess of value above that sum; and, if they should find the value of the land to be less than $131,000, then to apply the whole to the claim of the Union Institution for Savings.

The jury found the value of the estate at the time of the taking to have been $142,381.83, and assessed the damages of Farnsworth at $11,381.83, and of the Union Institution for Savings at $131,000; and the judge reported the case for the consideration of this court.

If any of the rulings were erroneous, the verdict was to be set aside, and a new trial to be ordered; otherwise, judgment was to be entered on the verdict.

J. P. Healy & E. P. Nettleton, for the respondent.

J. P. Treadwell, for Farnsworth.

J. A. Maxwell, for the Union Institution for Savings.

LORD, J. The case of *Breed* v. *Eastern Railroad*, arising in Essex County, in 1840, and reported 5 Gray, 470, note, decides that, when land is taken for a public purpose, the damages for the taking are to be assessed to the owner of the equity of redemption, without regard to the question whether or not there

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are mortgages upon it. The principle upon which that case is settled is decisive of this.

Whether, under the St. of 1873, *c.* 340, a taking because of a surrender by the owner is to be deemed a taking under the right of eminent domain, is not very material, inasmuch as the statute provides that the assessment of damages and the general mode of proceeding therein shall be determined in the same manner as when taken under such right, although, as matter of form, words implying purchase and sale are used.

It is wholly inconsistent with the objects and purposes of the act, that anything less than the whole estate should be surrendered by the person having the right to surrender. The proceeding is in the nature of a proceeding *in rem*, a proceeding against the land. By express provision of the statute, all necessary expenses incurred in the filling "shall constitute a lien upon the lands filled, and a lien upon all buildings upon such lands, and may be collected, and the city collector may purchase such lands, or lands and buildings, in behalf of the city; all as is provided by law for the collection of taxes upon real estate, and in case of land sold for taxes." Then follow provisions in relation to the mode of payment by "the owner of any estate so assessed," and proceedings for revision of the cost by a jury, which are not material in this case.

Section 4 provides that "any person dissatisfied with the assessment of the expense of raising the grade of his said land may give notice thereof to the city council within six months after such assessment is made, and the city shall thereupon take said land," and, after providing for the mode of recording a description of the land as so taken, the statute proceeds, "and the title to lands so taken shall vest absolutely in the city."

A mortgagee not in possession has no claim for compensation for injury to the land when lawfully used by any party. A mortgagee thus out of possession cannot be assessed for the improvements, nor does the statute recognize in him any estate in the land which he can surrender.

A mortgagor and mortgagee have no joint interest in lands as against third persons; nor have they distinct interests. Their estates are identical. As to the rest of the world, except the mortgagee, the entire estate is in the owner of the equity of

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redemption; but, as between him and the mortgagee, the latter is the owner, not of another, but of the same estate. Having no joint interest, they cannot join, or be joined, in an application to assess the damages for the taking. Having no distinct estates in the same land, they cannot surrender severally. Whether the owner of a life estate and the remainderman can join in a proceeding of this kind, it is not necessary to decide. Entirely different considerations would affect that relation. But, in case of mortgagor and mortgagee, the owner of the equity is the only person entitled to surrender, though there may be one or many mortgagees of the same estate. See *Ballard* v. *Ballard Vale Co.* 5 Gray, 468, and *Paine* v. *Woods*, 108 Mass. 160. In equity, the damages assessed to the owner of the land would be deemed to be land, and the mortgagee could follow such assessed damages and have the same applied to the payment of his mortgage. *Pond* v. *Eddy*, 118 Mass. 149.

When these parties were before us on a former occasion, the only question presented and decided was, whether the present petitioner had a right, under the facts reported, to surrender his interest to the city and claim compensation therefor. *Farnsworth* v. *Boston*, 121 Mass. 173. The extent of the interest was not before the court, nor was it decided by the court. There are *dicta* in the opinion which would apparently limit his right to the value of the equity of redemption, although it is expressly said that "it is not necessary to consider what are the rights of the mortgagees to surrender." There would perhaps be greater difficulties in determining what is the value of an equity of redemption as between the city and the petitioner alone, than would exist if mortgagor and mortgagee were joint petitioners. It would be a trial between two parties, neither of whom could rightfully represent the mortgagee, upon whom the finding of the jury could not be binding.

The view which we take has been recognized, and its correctness sanctioned by the general railroad law of 1874. St. 1874, *c.* 372. That statute provides, that in all cases of the assessment of damages for lands taken for the construction or maintenance of a railroad, if the land for which damages are claimed is subject to mortgage, all mortgagors and mortgagees shall be made parties to the proceeding. §§ 76, 77. It recognizes the fact that, though

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the land is mortgaged, the estate of the mortgagor and mortgagee is but one for the purpose of being valued. The interest of a mortgagee, as such, is not to be assessed; but the value of the estate is to be ascertained in a gross sum, by the county commissioners, or the jury, as the case may be. That gross sum is to be distributed according to the relative rights of the mortgagors and mortgagees. The mode in which the division is to be made is not specifically pointed out in the statute. Section 76 provides the mode in which mortgagors and mortgagees shall become parties to the proceedings. Section 77 is in these words: "When mortgagors or mortgagees commence or become parties to proceedings upon a petition for such damages, entire damages shall, upon final judgment, be assessed for the property taken, and such portion thereof ordered to be paid to every mortgagee, being a party, in the order of his mortgage, as is equal to the sum then unpaid thereon, and the balance to the mortgagor; and separate judgment shall be entered accordingly for each mortgagee, who shall hold his judgment in trust, first with any proceeds realized thereon to satisfy his mortgage debt, and, after such debt is in any way satisfied, to assign the judgment or pay over any balance of proceeds to the mortgagor or other person entitled thereto." By this section the entire damages are to be assessed in one sum, which sum is to be paid to the several mortgagees in the order of the several mortgages, and a separate judgment is to be entered for each mortgagee, who shall hold his judgment in trust for himself and the mortgagor, or other person in interest.

Whether the respective rights of mortgagor and mortgagee are to be determined in the mode usually adopted, by proceedings in equity, or how otherwise, we have no occasion to inquire; for the statute is cited, not with any view of giving construction to it; nor because it would, under any circumstances, affect the rights of these parties; but simply to show that the legislative branch of the government in acting upon the subject has recognized the accuracy of the principle in *Breed* v. *Eastern Railroad*, *ubi supra*, that as between mortgagor and mortgagee there is but one estate, the damages to which must be assessed in gross, and the judgment for the amount recovered must be held in trust, to be distributed according to the equitable rights of mortgagor and

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mortgagee, which are to be determined between themselves, and in which question the party taking has no interest.

Since this case was argued, and while it has been under advisement, the case of *Wilson* v. *European & North American Railway*, 67 Maine, 358, in some respects in conflict with the views here expressed, has been published. A decision by a court which we respect so highly as we do the Supreme Judicial Court of the State of Maine has induced us to review the subject. Upon the best consideration we can give to it, that decision seems not to rest upon principles so satisfactory as those upon which our result is based. They seem to us less practical, less convenient, and less equitable, as well as less logical. We cannot regard the mortgagor and mortgagee as having either distinct estates in the mortgaged lands, or a joint estate; and we see great practical difficulty in either view. If joined, the inquiry of the jury would be, not what interest has the mortgagee in the land, but what sum of money does the mortgagor owe the mortgagee. Each owns the whole land: the mortgagor as to all the world except the mortgagee; the mortgagee as between himself and the mortgagor. In case of several successive mortgagees, if the last mortgagee should present a petition for the assessment of his damages, we apprehend there would be difficulty in making the mortgagor and an intervening mortgagee joint parties, or in any manner binding them by the assessment of damages. If the mortgage were one of indemnity against a liability not fixed, there would be difficulty in determining the measure of damages. If it were indemnity, for example, against a liability of the mortgagee for the mortgagor as bail, and the mortgagee has recovered his damages for the land taken, and the liability as bail is never fixed, it is not easy to see how the mortgagor's rights are protected. In a more common case, where, by reason of a complication of accounts and the relations between the parties, their respective rights could be settled only in equity, by a bill to redeem or a bill to foreclose the mortgage, we see greater difficulties. It is not a subject upon which, on any principles of equity, the parties can be required to interplead. Or, in the very common case of dispute between mortgagor and mortgagee, which can be settled at law without a resort to equity, but involving such a state of accounts as to be unfit to be tried by a jury, and

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an auditor is appointed, who are to be the parties before the auditor? In case the master in chancery or auditor makes a ruling unsatisfactory to either of the petitioners, in which ruling the respondent has no interest, can the petitioner except to a ruling in favor of his co-petitioner, and require the respondent to go with him to the court of final resort, and perhaps to several rehearings, and be taxed in costs for such continued litigation between the co-petitioners, when there is really no difficulty in determining the value of the land? It is easy also to see that the measure of damages is not necessarily the same, between the respondent and the mortgagor, as between the respondent and the mortgagee. If a person own a parcel of land, he may mortgage the southerly half of it, which is parcel of the whole; the taker for public use takes the southerly half of the parcel which is mortgaged; as between the taker and the mortgagee, the measure of damages is the whole value of the land taken, inasmuch as the mortgagee has no remaining land to be benefited; as between the taker and the mortgagor, the measure of damages is the value of the land taken, less the benefits accruing to the remaining land by reason of the taking. These and various other practical difficulties are all obviated by treating the damages assessed as land, as in equity it may be.

Such a taking is a public taking; the proceeding for the assessment of damages is a public proceeding; the mortgagee has equal knowledge with the mortgagor of the taking. He may protect all his rights. He may by proper proceedings follow the money into the hands of the mortgagor; or he may prevent it from going into his hands. Of course the burden will be upon him, as it should be, to show tc what extent he has a claim upon the funds; and that question would then be litigated between the parties in interest, and not at the cost of a third party who has no interest in it.

Nor can we accede to the justness of the criticism upon the case of *Breed* v. *Eastern Railroad*, as reported in 5 Gray, 470, note. The decision of *Breed* v. *Eastern Railroad* was so well known to the profession, that, although not reported, it was cited by counsel in *Ballard* v. *Ballard Vale Co.*, to which it was appended as a note, the then reporter deeming it of sufficient public interest to be reported. The learned judge, in his opinion in

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Wilson v. *European & North American Railway*, uses this language, "that it does not appear in the report of the case whether the mortgagee appeared or not"; and again, "the mortgagor was the petitioner, no one setting up any superior or opposing claim." The fact is overlooked that it appears by the report that counsel appeared "for the respondents and the mortgagees." At the time of that decision large discretion was exercised by the reporter as to what cases should be reported. The reporter, afterwards Mr. Justice Metcalf, was a very able, accurate and acute common lawyer. He probably supposed that the principle enunciated in the decision was so in harmony with the law that it was unnecessary to report it. Certainly, from what we know of him, we should expect him to have reported it, if, in his judgment, the decision in any manner varied from established rules, or was even novel in its application.

We do not deem the fact of registration a controlling one in the consideration of this question. For the purposes for which it is designed, the record of deeds is undoubtedly of the highest importance. But when land is taken for public use, it is not the record title that is acquired, nor is it any person's title, but the land itself, irrespective of record or other ownership. If the record would afford justification for compensating the apparent absolute owner as against the true owner, we should be very slow to say that one, taking under such right, would be justified in paying the mortgagee, as against the mortgagor, the amount apparently due upon a mortgage of record. The record is notice of a mortgage, but it is certainly unsafe evidence of the amount of the debt due upon the mortgage; and if the fact that the mortgage is upon record requires that the taker should deem the mortgagee an owner, all the difficulties of ascertaining the true interest of the mortgagee, which have been before suggested, would exist. Various cases are cited from the reports of this Commonwealth, in all of which the court declined to pass upon the question whether the mortgagee had an interest which would be the subject of a claim; though in several of them are distinct intimations that there may be modes in which the interest of the mortgagee may be protected. Whether he would be remediless in states where there is not sufficient equity jurisdiction to protect his rights, or whether the common law could be found to

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have elasticity enough to provide a mode of remedy, or whether it is a proper subject for legislative provision, we have no occasion to inquire; for, in this Commonwealth, there is full equity jurisdiction, and, under that jurisdiction, land, which is, by force of law, converted into money, may, as between mortgagor and mortgagee, be still treated as subject to the mortgage lien, and applied to the discharge of the mortgage.

We are therefore of opinion that the mortgagee was improperly admitted as a party. *New trial ordered.*

WALTER FARNSWORTH *vs.* CITY OF BOSTON.

Suffolk. March 29. — November 25, 1878.

A petition for the assessment of damages for land taken, under the St. of 1873, *c.* 340, to abate a nuisance, was filed by the owner of the equity of redemption of a lot of land so taken. Subsequently, the mortgagee filed a separate petition to have his damages assessed, and the two were ordered to be tried together. The jury estimated the value of the land at a sum less than the mortgage, and a verdict was returned for the mortgagee for the assessed value; and for the respondent on the petition of the owner of the equity of redemption, and judgment was ordered accordingly, with costs to the respondent. *Held*, on exceptions to this order, alleged by the owner of the equity of redemption, that the two petitions should not have been tried together; and that the case must stand for further proceedings.

PETITION to the Superior Court, filed December 18, 1876, for a jury to assess the damages occasioned to the petitioner by the taking by the respondent of a lot of land in Boston, under the St. of 1873, *c.* 340.

After the filing of this petition, Henrietta Goldsmith filed her petition for damages suffered by her as mortgagee of the same land by the same taking; and the trial of Farnsworth's case was postponed to allow of proper notice to the city of Goldsmith's petition. The judge ordered both cases to be tried together, before one jury.

At the trial, before *Dewey*, J., it appeared that on December 29, 1876, the city awarded as damages, for the taking of the land, the sum of $8,139. It was agreed by all parties that Gold-

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smith's mortgage exceeded $13,000. The jury found the value of the land to be, with interest, $12,073.44; and, after deducting certain sums due the city, returned a verdict of $10,496.66 for Goldsmith; and she accepted the verdict, and collected the same, with her costs, on execution against the city. The jury also returned a verdict for the city in Farnsworth's case.

Farnsworth asked that judgment be entered for the city without costs, because the damages were increased above the sum before offered by the city. The judge refused this request, and, at the end of the term, passed a general order for judgment. Farnsworth alleged exceptions.

J. P. Treadwell, for Farnsworth.

E. P. Nettleton, for the respondent.

LORD, J. This petition was by order of the court tried with another filed by a mortgagee of the land claimed by the petitioner. Such a proceeding, under the decision in *Farnsworth* v. *Boston*, *ante*, 1, was irregular, and there was a mistrial. Upon the mere question of costs which is presented, the court rightfully ordered judgment for costs for the respondent, if the general judgment for the respondent upon the merits was right. The facts presented by the bill of exceptions show the whole proceeding to have been erroneous, and the only disposition we can make of the case is to permit it to stand in the Superior Court for such proceedings as the parties and that court shall deem proper, in view of that decision.

Ordered accordingly.

MELLEN C. HIGHT & another *vs.* H. S. BACON & another.

Suffolk. March 29. — November 16, 1878.

If a purchaser inspects for himself the specific article sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the article, and the particular use which is to be made of it is not communicated by the purchaser at the time of the sale, there is no implied warranty on the part of the seller that the article is reasonably fit for the purpose to which it is to be applied, although the seller supposes that the purchaser intends to use it for the purpose for which he in fact buys it.

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In an action for goods sold and delivered, evidence of a usage of trade, which gives the purchaser a right to revoke the contract when the article which appears to be good is sold as good, but turns out to be rotten and nearly worthless, is not admissible under an answer which does not allege that the sale had been revoked.

CONTRACT on an account annexed for leather sold and delivered. The answer contained a general denial, and alleged an agreement on the part of the plaintiffs that the leather was good, and suitable to be made into boots and shoes, and averred that it was not suitable for that purpose, but was worthless.

At the trial in the Superior Court, before *Bacon*, J., without a jury, it appeared in evidence that the plaintiffs were dealers in leather in Boston, and that the defendants were manufacturers of boots and shoes in Milford; that the leather was sold at the store of the plaintiffs; that the defendants had full opportunity at the time of purchase to examine the whole lot purchased, and did examine two rolls out of the twenty sold; and that the rolls examined were equal in quality to that of the bulk.

It also appeared that the leather was bought by the defendants for the purpose of being manufactured into boots and shoes; and that the plaintiffs, when the sale was made, supposed that such was the purpose for which it was bought, but nothing was said at the sale about this purpose, although an inquiry was made as to whether the leather would crimp; and that the leather appeared to be good leather, and was suitable for the purpose above stated, and both parties believed it to be suitable for such purpose.

The defendants put in evidence tending to show that the leather was rotten and unfit to be made into boots and shoes, and contained a latent defect, but was of some value; and offered evidence tending to show that there was a general and universal usage in the leather trade, that, when leather is sold as good leather, which appears like good leather, and it turns out to be rotten and nearly worthless, the buyer is not bound by the contract of sale, and may revoke it as in this case; but the defend ants did not contend that there was any fraud on the part of the plaintiffs. The judge excluded this evidence, on the ground that such a usage would not be valid in this case.

Upon all the evidence in the case bearing upon the sale, the judge found that there was no express warranty; and, upon that

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part of the evidence which is stated above, ruled, as a matter of law, that there could be no implied warranty of the leather sold; and ordered judgment for the plaintiffs. The defendants alleged exceptions.

Defendants, pro se.

E. O. Shepard, for the plaintiffs.

COLT, J. The judge before whom this case was tried found as a fact that there was no express warranty by the plaintiffs of the quality of the leather sold to the defendants; and ruled, as matter of law, that, on the evidence stated in the bill of exceptions, there could be no implied warranty binding upon the plaintiffs.

There was nothing at the time of the sale said by either party of the purpose for which the leather was bought; and the evidence that the defendants were manufacturers of boots and shoes, and at the time of the sale asked the plaintiffs if the leather would crimp, is not sufficient to prove an implied warranty on the part of the plaintiffs, that the leather was suitable for the purpose of being manufactured into boots and shoes, even if the plaintiffs supposed it was bought for that purpose.

It is said that when a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied warranty that the article is reasonably fit for the purpose to which it is to be applied. *French* v. *Vining*, 102 Mass. 132, 135. *Jones* v. *Just*, L. R. 3 Q. B. 197. But where the purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine of *caveat emptor* applies. *Barnard* v. *Kellogg*, 10 Wall. 383. *Cunningham* v. *Hall*, 4 Allen, 268. *Dounce* v. *Dow*, 64 N. Y. 411.

The case at bar is an action upon an executed sale by one dealer to another of a specific quantity of leather, which the seller did not manufacture, and as to the quality of which he had no superior information. The parties stood on an equal footing; the buyer had full opportunity to examine the goods in the store of the plaintiffs, and did, in fact, examine two rolls, which were fair

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samples of the lot. There was no fraud practised. The leather appeared to be good, and both parties believed it to be good and suitable for the purpose of being manufactured into boots and shoes. It is plain that the buyer inspected and selected the leather himself, without relying on the skill and judgment of the seller. The particular use which was to be made of it was not made known by the buyer at the time of the sale, in such a way as to indicate a purpose to put upon the seller the responsibility of furnishing an article reasonably fit for the purpose to which it was to be applied. The defect complained of was a latent defect. *Howard* v. *Emerson*, 110 Mass. 320. *Deming* v. *Foster*, 42 N. H. 165.

The defendants offered to prove a usage of the trade, which gives the buyer a right to revoke the contract where leather which appears to be good is sold as good, but turns out to be rotten and nearly worthless. But this defence is not open under the answer in this case. The answer does not allege that the sale had been revoked by the defendants. It is unnecessary to consider whether the usage offered to be proved is a valid usage. *Exceptions overruled*

MARY L. HIGGINS *vs.* CATHERINE McCABE.

Suffolk. April 1; Nov. 12. — Nov. 16, 1878.

In an action of tort, the declaration alleged, that the mother of the plaintiff, being about to be delivered of the plaintiff, employed the defendant as a midwife; that the defendant, while so employed, pretending to be competent and skilful in treating diseases of the eyes, such as the plaintiff then had, undertook the treatment of the plaintiff, and refused to allow a regular physician to be called in, and so negligently and unskilfully treated the plaintiff that the plaintiff became totally blind. The plaintiff's evidence tended to show the employment of the defendant; that a disease of the plaintiff's eyes, a few days after birth, was called to the attention of the defendant, who said she could cure it, and had cured other children so affected, and told the plaintiff's mother not to call in a physician; that she prescribed simple washes; and that the plaintiff soon after became blind. There was also expert testimony to the effect that the disease was a serious one, which probably could have been cured had it been properly treated in time; that the defendant's remedies were not proper in such a case, and that more severe remedies were required. *Held*, in the absence of evidence that

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the care of the child's eyes was included in the ordinary duties of a midwife, that it must be considered as not embraced in the contract; that the defendant's services in regard to the eyes were gratuitously rendered; and that the jury would not be warranted in returning a verdict for the plaintiff. *Held, also,* that a question to a witness for the plaintiff, if she knew what duties the defendant took upon herself in the general course of her business as midwife, was properly excluded.

TORT. Writ dated January 18, 1877. The declaration was as follows:

"And the plaintiff says, that the defendant held herself out as a competent and skilful midwife practicing in Boston; that the mother of plaintiff was about to be delivered of child, and, at the defendant's request, employed the defendant as midwife; that thereafterwards the mother of plaintiff was delivered of child, being the plaintiff, and the defendant acted as midwife; and the defendant neglected to take proper care of the plaintiff, and treated the plaintiff so negligently and carelessly that the plaintiff contracted a disease of the eyes, and became totally blind.

"And the plaintiff further says, that the defendant, while so employed as midwife, pretending to be competent and skilful in treating diseases of the eyes, such as plaintiff then had, undertook the treatment of plaintiff, and so negligently and unskilfully treated the plaintiff that the plaintiff became totally blind.

"And the plaintiff further says, that the defendant, while so employed as midwife, asserted that she was competent to treat the disease of plaintiff's eyes, and refused to allow a regular physician to be called in, and so unskilfully and carelessly treated the plaintiff that the plaintiff became totally blind."

The answer contained a general denial; alleged contributory negligence on the part of the plaintiff and her parents; denied that the defendant was employed as midwife, or neglected to take proper care of the plaintiff; and averred that whatever the defendant did for the plaintiff, or her mother, was done by the defendant in a friendly way, and as a matter of charity, and for no consideration; and that she did not represent herself to be skilful in treating diseases of the eyes, or skilful in treating any disease, and did not treat the plaintiff as a skilled person for a disease, but whatever she did was done at the request of the mother of the plaintiff, and under her direction.

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Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, which, after referring to the pleadings, proceeded in substance as follows:

Margaret C. Higgins, the mother of the child, testified that she had known the defendant for twelve years; that the defendant's well-known business was that of midwife; that she had employed the defendant in her family twice before as midwife, and had paid her for such services; that, being about to be delivered of the plaintiff, she sent her husband to procure the services of the defendant; that, shortly after the defendant came, the child was born; that, after the birth of the plaintiff, the defendant told her that she would come in once a day for nine days and take care of the witness and the child; that the plaintiff was born on May 5, 1876; that, three days after, she noticed an inflammation of one of the child's eyes, and called the defendant's attention to it; that the defendant said it was nothing serious; that it resulted from too much light, and directed the witness to darken the room and to dip a linen cloth in water and place it on the child's eye; that the room in which she was ill was a small bedroom leading from the kitchen, and had one window without blinds, over which a white curtain was nailed; that, in accordance with the defendant's direction, the room was darkened, a shawl being pinned over the curtain, and a cloth dipped in water was placed upon the child's eye; that the next day the defendant again told the witness that it was nothing serious, and told her that she could cure it, and sent to an apothecary's and got some rose-water, with which she washed the child's eye; that she came in again that evening and washed the child's eyes, and thereafter for two weeks she came in twice every day, and washed and dressed the child, and applied her washes to the child's eyes; that, two days after the first eye was affected, the other eye began to be affected; and she spoke to the defendant and said she was alarmed about the child's eyes, and thought that some competent physician should be called in; that the defendant told her that she need not be alarmed; that she, the defendant, could cure the disease; that she had cured with her washes several children so afflicted, and mentioned the child of one Mrs. Stevens, whose eyes were much sorer than the plaintiff's, and said she had cured the child's eyes with her

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washes; that the defendant also told her not to call in a doctor, saying that "the doctors spoiled the eyes of half the children," that "the doctors' washes would burn the child's eyes out;" that she then told her to send for a fresh egg and have it beaten up with sugar, and wash the child's eyes with that; that she sent for the egg, and the defendant washed the child's eyes with that, and continued the use of that for two weeks; that the defendant kept telling her that the eyes were getting better; that at the end of two weeks she sent for Dr. McDonald for herself; and then called his attention to the child's eyes; that the next day the witness sent for Dr. Pagani, who came, and ordered a prescription and washed the child's eyes, and examined them; but did not undertake to cure the child's eyes; that the child was then taken to the Eye and Ear Infirmary, but, in consequence of information received there, was not left for treatment; that, about two months after birth, the child was taken to Dr. Stevens, but was then totally blind; that the defendant called, after Dr. Pagani had gone, and used more of the egg and sugar on the child's eyes, saying that "the doctor's washes would burn the child's eyes out;" that the witness during the two weeks was sick in bed, and her husband was away at work during most of the time in the day, a girl about fourteen years old doing the work about the house; that the child, when not in the defendant's hands, was in bed with its mother, except once when it was taken up stairs for three or four minutes; that a fire was kept in the kitchen, and the bedroom was kept very warm.

The witness was then asked by the plaintiff's counsel if she knew what duties the defendant took upon herself in the general course of her business as midwife. On the defendant's objection, the judge excluded the question.

William Higgins, father of the child, testified that he went for the defendant at his wife's direction, and asked her to come to his wife, telling her he would pay her whatever she asked; that she said she would come at once, and would come in once a day for nine days, and take care of the mother and child; that he heard the defendant tell his wife not to call in a physician; that the defendant kept telling them that the eyes were getting better, and that he noticed that the inflammation was going down on the outside of the eyes.

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Dr. McDonald testified that he saw the child about two weeks after its birth; that the sight of one eye was then totally gone, and he was in doubt about the other, — he thought there might have been a little sight left in it; that the disease was purulent ophthalmia, a disease which should be attended to in its first stages, but in the hands of a competent and skilful person it rarely ever resulted in loss of sight; that he never used rose-water and egg and sugar, but thought they were harmless, and served to keep the eye clean; that in his opinion the treatment was not proper, as it did not go far enough; that the remedy commonly used was a solution of alum: that the eyes must be kept clean, and, as far as the rose-water and egg and sugar contributed to that, they were proper, but he should not stop there. On cross-examination, he was asked if it was not possible that the sight might have been lost even if the child had been in the hands of a competent and skilful physician. He said it was possible, but not probable; that if the child had had the most skilful treatment and was exposed to too much light, or to cold, it would nullify the treatment; that he had known Mrs. McCabe for twelve years, and considered her a skilful midwife.

Dr. Stevens testified that he had given special attention to diseases of the eye; that he saw the child about two months after its birth, and it was then totally blind, and incurable; that the disease was purulent ophthalmia; that in his opinion the treatment of defendant was not proper; that he should object to the egg and sugar, — the rose-water was good to keep the eyes clean, but he thought lukewarm water was better; that the common remedy was a solution of alum, and in severe cases nitrate of silver; that he thought that the articles used by the defendant could not be called remedies, but the rose-water he called an adjuvant. He also testified, that the eyes should be kept clean, and good care taken of the patient, — without this the remedies would probably fail; that this was a severe case, calling for severe treatment; that for the last ten years he had treated, on an average, five or six cases of this disease a year, and had been unsuccessful in only one, where he lost the sight of one eye, both being affected; that this was the only case of unsuccessful treatment that had come to his personal knowledge, though he had heard of others.

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The defendant asked the judge to rule, that upon this evidence the action could not be maintained, and that there was no evidence to go to the jury. The judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions, which were argued in April 1878, and afterwards submitted on briefs to all the judges.

M. H. Swett, for the plaintiff. There was evidence in this case that the defendant, a midwife, was employed, for a compensation, to take care of the mother and child for nine days; that within that time, on the defendant's attention being called to the condition of the child's eyes, she said it was nothing serious, and that she could cure it, and prescribed remedies; that, on the mother becoming alarmed, and wishing a physician to be called in, the defendant told her not to do so, and repeated the statement that she could cure the child, and continued to do so. There was also evidence that this treatment was improper, and that in consequence of it the child became entirely blind. On this evidence, it is submitted that the action can be maintained.

1. The fact that the defendant undertook the treatment of the plaintiff, and did treat her for a disease of the eyes, created a legal duty on the part of the defendant towards the plaintiff. Whether the defendant was a regular physician or not is immaterial. She assumed to be competent to treat the disease, and did treat it in an ignorant or negligent manner, and is therefore liable. *Pippin* v. *Sheppard*, 11 Price, 400. *Rex* v. *Spiller*, 5 C. & P. 333. *Ruddock* v. *Lowe*, 4 F. & F. 519. *Jones* v. *Fay*, 4 F. & F. 525. *Seare* v. *Prentice*, 8 East, 348. *Slater* v. *Baker*, 2 Wils. 359. *Long* v. *Morrison*, 14 Ind. 595. *Carpenter* v. *Blake*, 60 Barb. 488.

2. If material, the question should have been left to the jury whether the care of the child's eyes was not within the original contract entered into with the defendant; and if not, whether there was not an implied contract by which the defendant would have been entitled to pay for the services performed in relation to the eyes. But, even if the service was gratuitously rendered, the duty to exercise reasonable care and skill still existed; and the only question would be as to the degree of care and skill. *Coggs* v. *Bernard*, 2 Ld. Raym. 909. *Shiells* v. *Blackburne*, 1

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H Bl. 158. *Wilson* v. *Brett*, 11 M. & W. 113. *Gill* v. *Middleton*, 105 Mass. 477. *Jenkins* v. *Bacon*, 111 Mass. 373.

3. The question to Mrs. Higgins was competent, on the issue of what duties were included within the contract. The defendant had been employed by the witness twice before in the same capacity; and what duties the defendant was accustomed to perform under such a contract were known to the witness, and the contract must have been entered into with reference to them.

W. Gaston & J. W. O'Brien, for the defendant.

COLT, J. This action proceeds upon the ground that the defendant failed to discharge a legal duty which she owed the plaintiff, resulting in the injury complained of. The question is whether the evidence relied on by the plaintiff would justify a verdict in favor of the child; and, in the opinion of a majority of the court, it would not.

It appears that the defendant was originally employed only as a midwife. The parents had employed her twice before in that capacity. There was no competent evidence that the treatment of diseases of the eyes which might be developed in the child was embraced in the duties which the defendant undertook as midwife; and there was no evidence that the defendant was unskilful or negligent in the performance of any of the duties with which she was properly chargeable in that capacity.

But it is insisted that, independently of the employment as midwife, the jury upon this evidence might properly find that the defendant, professing to have superior skill and experience, held herself out as competent to cure this particular disease, and thereupon was permitted by the mother to assume the treatment of it. The evidence on which it is sought to charge the defendant with this additional duty is found in the testimony of the mother; and that testimony must be construed with reference to the character and relation of the parties, and the admitted facts in the case. The services of the defendant in respect to the cure of this disease were wholly gratuitous; they were performed as acts of benevolence only. The defendant was a midwife; the jury would not be justified in finding that she claimed to possess, or might reasonably be expected from her calling to have, the peculiar knowledge, skill, and experience of an expert in such mat-

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ters. The representations of the defendant, that she could cure the child with simple remedies and washes, that she had cured other children in the same way, who were similarly afflicted, and that there was no need of a doctor, were but the expression of an opinion as to the efficacy of her remedies, and did not imply that she undertook to use that higher skill of the medical profession which is required in the treatment of the more complicated and delicate organs. The question was whether she had discharged the duty which she assumed with that skill which she professed to have, and with that diligence which might reasonably have been expected of her. Upon that question, the fact that the service was rendered without compensation must have an important, if not decisive, bearing. It is often said, that a gratuitous agent is liable for gross negligence only; but without regard to degrees of negligence, it is plain that the duty imposed upon such an agent is less stringent than when the service undertaken is founded upon a consideration paid. Under the rule requiring ordinary care as applied to this case, we see no evidence of neglect in any degree. A physician must apply the skill and learning which belong to his profession; but a person who, without special qualifications, volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. To hold otherwise would be to charge responsibility in damages upon all who make mistakes in the performance of kindly offices for the sick. *Gill* v. *Middleton*, 105 Mass. 477, 479. *Leighton* v. *Sargent*, 11 Foster, 119. *Simonds* v. *Henry*, 39 Maine, 155. *Lanphier* v. *Phipos*, 8 C. & P. 475. *Hancke* v. *Hooper*, 7 C. & P. 81.

The defendant was attentive and diligent in her treatment of the child, and in the use of the remedies she proposed. There was evidence, it is true, from regular physicians, that, if other and more powerful remedies had been seasonably applied, they would probably have effected a cure; but these were remedies known to the medical profession, of which the defendant neither had nor professed to have knowledge. It was not a case where the defendant, as in the cases cited by the plaintiff, assumed to act as a regular surgeon or a regular practitioner. *Ruddock* v. *Lowe*, 4 F. & F. 519. *Jones* v. *Fay*, 4 F. & F. 525.

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The question put by the plaintiff to Mrs. Higgins was properly excluded. The knowledge which the witness had of the duties which the defendant usually took upon herself in the general course of her business as midwife was immaterial. There was no evidence that she was employed to do more than was commonly required of midwives, or that she undertook or volunteered to do more, except in the way previously considered.

Exceptions overruled.

EUNICE W. BLACKINGTON, administratrix, *vs.* ARTHUR JOHNSON.

Suffolk. November 18. — 20, 1878. COLT & MORTON, JJ., absent.

Under the Gen. Sts. *c.* 129, § 72, where a declaration contains two distinct counts, the allegations in one are not conclusive evidence against the plaintiff upon the trial of the other.

An auditor's general finding, as *prima facie* evidence, may be overcome by the particular facts and the evidence stated in his report and warranting a different conclusion.

A witness, called by one party for any purpose, may be cross-examined by the other party upon the whole case; and the limit to such cross-examination is within the discretion of the presiding judge.

Under the Gen. Sts. *c.* 112, § 18, authorizing this court to award double costs "if it appears that the exceptions are frivolous, immaterial, or intended for delay," the question whether that fact appears is for the court upon the bill of exceptions, without other evidence or argument by either party.

CONTRACT against the maker of a promissory note for $300, dated November 12, 1875, and payable, six months after date, to the order of the plaintiff's intestate. Writ dated December 13, 1876. The answer contained a general denial, and alleged payment by another promissory note for $300, dated May 12, 1876, signed by the defendant, payable in six months, and delivered to the plaintiff's intestate. The defendant also filed a declaration in set-off for services rendered the intestate, to the amount of $506. The plaintiff thereupon was allowed to amend his declaration by adding a second count declaring on the note of May 12, 1876.

The case was referred to an auditor, who reported that, at the hearing before him, it appeared in evidence that the considera

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tion for the first note was money lent by the intestate to the defendant; that, when the note became due, a new note for the same sum was given, payable on demand; that the papers left by the intestate had been examined, and the first note found among them; that the second note was not found, and was not produced at the hearing; that there was no evidence that it had ever been seen by any one after the defendant signed it and gave it to the intestate; that the defendant testified that he paid the first note at its maturity by giving the second at a time when he and the intestate were alone together, then paying the six months' interest, nine dollars, partly in money, and partly in things of small value, which the intestate had received from him at various times; that he admitted that he had never paid the second note in money, and that its date and tenor were correctly set forth in the plaintiff's second count. The auditor found that the first note had been paid by the second; and found for the plaintiff on the second count; and for the defendant on his declaration in set-off to the amount of $218.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff put in evidence the auditor's report, which was read to the jury, and called the auditor. who testified that no one but the defendant testified before him as to the payment of the first note and the making of the second, as stated in the report. The plaintiff then rested her case. The defendant, in his opening, stated that he should offer no evidence except to control the auditor's report on one item of the declaration in set-off, and called several witnesses, who testified on this point; and the plaintiff was allowed, against the defendant's objection, to cross-examine them as to the two notes, and as to all the items in set-off.

The plaintiff went to the jury upon both notes, and contended that the first note had never been paid, and that there never was a second note; but that if the jury found that the first note had been paid by the giving of the second, then that she could recover upon the second note, but did not claim to recover upon but one of the notes.

The defendant asked the judge to instruct the jury that there was no evidence upon which the plaintiff could recover on the first note, because the auditor found that it was paid or taken

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up by the second note, and because the plaintiff brought suit on the second note, and was estopped to deny that the first note was paid.

The judge refused to give the instructions requested, but instructed the jury that the auditor's report was *prima facie* evidence, and, unless it was controlled, that their verdict should be in accordance with it, both as to the finding on the notes and the set-off.

The jury returned a verdict for the plaintiff, for $162.50, on the first note; and the defendant alleged exceptions.

E. T. Buss, for the defendant.

F. C. Welch, for the plaintiff, was not called upon, and moved for double costs.

GRAY, C. J. The allegations in one count of the declaration were not conclusive evidence against the plaintiff upon the trial of the other. Gen. Sts. *c.* 129, § 72. *Lyons* v. *Ward*, 124 Mass. 364.

The effect of the auditor's general finding as *prima facie* evidence might be overcome by the particular facts and the evidence stated in his report and warranting a different conclusion. *Commonwealth* v. *Cambridge*, 4 Met. 35. *Taunton Iron Co.* v. *Richmond*, 8 Met. 434, 436. *Peru Co.* v. *Whipple Manuf. Co.* 102 Mass. 464, 466.

The admission of the questions put upon cross-examination was within the discretion of the presiding judge, and not a subject of exception. In the courts of this Commonwealth, a witness, called by one party for any purpose, may be cross-examined by the other party upon the whole case. *Moody* v. *Rowell*, 17 Pick. 490. *Beal* v. *Nichols*, 2 Gray, 262.

The defendant's counsel was not heard upon the motion for double costs, because, under the Gen. Sts. *c.* 112, § 13, and the similar provision of the Rev. Sts. *c.* 81, § 31, authorizing this court to award double costs "if it appears that the exceptions are frivolous, immaterial, or intended for delay," the question whether that fact appears has always been determined by the court from the bill of exceptions, without other evidence, or argument by either party.

In the present case, the exceptions appear to the court to be frivolous, and are therefore *Overruled, with double costs.*

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E. F. HUFF *vs.* SAMUEL FORD.

Suffolk. November 18. — 20, 1878. COLT & MORTON, JJ., absent.

A person employed and paid by a contractor as driver of a horse and wagon, which, together with the driver, the contractor lets by the day to a city to be used in the work of paving a street, and who has the entire management of the horse as to the manner of driving him, and whose duty it is to see that he is properly shod, is the servant of the contractor in so driving the horse and having him shod, and, for an injury to a third person caused by his negligence in these respects, the contractor is liable.

TORT for damages occasioned by the defendant's horse kicking a shoe through a window of a store occupied by the plaintiff. Answer, a general denial.

At the trial in the Superior Court, before *Pitman*, J., there was evidence tending to show that on August 31, 1876, the plaintiff was in the possession and occupancy of a store on Bromfield Street in Boston; that a large plate-glass window of the store was broken by the defendant's horse kicking a loose shoe through it after he had been violently struck twice by the driver; that the city was then repaving that street; that the defendant was the owner of horses and wagons which he let, among others the one in question, and furnished a driver by the day; that the horse, wagon, and driver were, at the time of the injury complained of, let by the defendant to the city, and were then under the exclusive direction and control of the city as to where to go and where to unload, and what to do in the performance of the work of paving; that the defendant had no other connection with the premises than that of letting his horse, wagon, and driver by the day, and they were kept at his expense; that the driver of the horse which damaged the plaintiff's window was furnished by and in the employ of the defendant, who paid him by the week; that the driver had the entire management of this horse; that he had the selection of his route to and from the street, fed and took care of the horse at noon, and at night fed and put him up in the defendant's stable, and harnessed him in the morning; and that it was his business to see that he was properly shod, and to get him shod if he needed it.

Upon this evidence the defendant contended, and asked the judge to rule, that the defendant was not liable in this action.

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But the judge refused so to rule, and ruled that the driver was the servant of the defendant; and that, if the window was broken by any want of reasonable care, or by the culpable carelessness of the defendant or his servant, the jury should find for the plaintiff.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. P. Hinds, for the defendant.

F. L. Hayes, for the plaintiff, was not called upon.

By the Court. The driver, employed and paid by the defendant, and who had the entire management of the horses as to the manner of driving them, and whose duty it was to see that they were properly shod, was the servant of the defendant in so driving the horses and having them shod; and for injuries to third persons by his negligence in these respects, the defendant was responsible. Whether the damage to the plaintiff's property was caused by such negligence, or by mere accident, was a question for the jury, and appears to have been submitted to them without objection. *Exceptions overruled.*

William H. S. Jordan *vs.* Margaret A. Siefert.

Suffolk. November 22. — 23, 1878. Morton & Lord, JJ., absent

A judgment by consent for the defendant, after a plea in abatement has been filed and sustained, and without further answer or trial, is no adjudication of the merits.

Contract upon an account annexed. Answer, judgment in another action for the same cause between the same parties.

At the trial in the Superior Court, without a jury, the defendant introduced the record of the judgment, which showed the following: 1st. A writ sued out by this plaintiff against this defendant, described to be administratrix of the estate of Charles A. Siefert, not stating the class of action to which it belonged, and containing a declaration precisely similar to that in the present action. 2d. A plea in abatement, that the writ did not state whether it was brought in contract, tort, or replevin, and

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that the count did not pursue the writ, the writ being against the defendant as administratrix, and the declaration against her personally. 3d. An order of the court, sustaining the plea in abatement. 4th. A subsequent judgment for the defendant upon the written consent of the plaintiff's attorney that "in this case judgment may enter for the defendant." The record showed no answer or trial upon the merits.

Upon these facts, the identity of the parties and of the claim declared on being admitted, *Putnam*, J. ruled that the other action was against the defendant personally, and that the judgment was a conclusive and final adjudication of the matters sought to be recovered in the present action; and found for the defendant. The plaintiff alleged exceptions.

D. B. Gove, for the plaintiff.

P. H. Hutchinson, for the defendant.

BY THE COURT. The judgment in the other action must be taken to have been rendered on the plea in abatement. The record shows that no issue on the merits was joined or tried. That judgment, therefore, is no bar to this action. *Wilbur* v. *Gilmore*, 21 Pick. 250. *Exceptions sustained*

ANNA K. GILMAN & another *vs.* GEORGE F. GILMAN.

Suffolk. November 14. — 25, 1878. COLT & MORTON, JJ., absent.

In an action upon a judgment recovered against the defendant in another state, he may plead and prove, notwithstanding any recitals in the record thereof, that he was not duly served with process, and did not authorize an attorney to appear for him, in the action in which the judgment was rendered; and an attachment and levy of execution upon the defendant's property in the state in which the judgment was recovered will not make the judgment binding upon him personally.

CONTRACT upon a judgment recovered by the plaintiffs against the defendant in the Supreme Judicial Court of Maine. Answer, "that said court never had or acquired jurisdiction of the person or property of the defendant so as to make the judgment set out a valid judgment."

At the trial in this court, before *Colt*, J. without a jury, the

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plaintiffs put in evidence a duly certified copy of the judgment declared on, and partial satisfaction of the same on execution, by which it appeared that no personal service was made on the defendant, who was a citizen of New York, but that an attachment of his property was made, and an order of notice to him duly published; that thereupon the defendant appeared by attorney and answered to the action; and that the action was continued from term to term for a period of about sixteen months, when the attorney withdrew his appearance, and the defendant was defaulted.

The defendant was permitted, against the objection of the plaintiffs, to introduce evidence upon which the judge found as a fact that the appearance of the attorney was without authority from the defendant. The plaintiffs asked the judge to rule that full faith and credit should be given to the judgment; that the record should be held to be conclusive; that it was not to be controlled by parol or other evidence; and that, if the appearance of the attorney was unauthorized, the defendant's remedy was in the court in which the record existed, and not in this court. But the judge refused so to rule; and found for the defendant. The plaintiffs alleged exceptions.

S. C. Maine & J. E. Carpenter, for the plaintiffs.

R. D. Smith & M. M. Weston, for the defendant, moved for double costs.

GRAY, C. J. It has been often decided by this court, that the record of a judgment of a court of another state is entitled to full faith and credit in this Commonwealth, under art. 4, § 1, of the Constitution of the United States, only when the court had jurisdiction of the cause and of the parties; and that the defendant, when sued upon the judgment here, may plead and prove, notwithstanding any recitals in the record thereof, that he was not duly served with process, and did not authorize an attorney to appear for him, in the action in which the judgment was rendered. *Gleason* v. *Dodd*, 4 Met. 333. *Phelps* v. *Brown*, 9 Cush. 390. *Carleton* v. *Bickford*, 13 Gray, 591. *McDermott* v. *Clary*, 107 Mass. 501. It is only in the case of a domestic judgment that the defendant is put to his writ of error. *Bodurtha* v. *Goodrich*, 8 Gray, 508. *Finneran* v. *Leonard*, 7 Allen, 54. *Hendrick* v. *Whittemore*, 105 Mass. 23, 28. *Brainard* v. *Fowler*, 119 Mass. 262. 265.

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The same view of the effect of a judgment of a court of one state, when sued on in another, has been affirmed, upon full consideration, by the Supreme Court of the United States, in two recent decisions, in one of which the court said that "the party assailing the judgment should have shown that the counsel who appeared was not employed by the defendant," and in the other, that "in the case of non-residents, like that under consideration, personal service cannot be dispensed with, unless the defendant voluntarily appears." *Thompson* v. *Whitman*, 18 Wall. 457, 464. *Knowles* v. *Gaslight & Coke Co.* 19 Wall. 58, 62.

The attachment and levy of execution upon the defendant's property in the State of Maine did not make the judgment binding upon him personally. *Woodward* v. *Tremere*, 6 Pick. 354. *Boyd* v. *Urquhart*, 1 Sprague, 423.

Exceptions overruled, with double costs.

Ellen A. Clatur *vs.* George Donegan.

Suffolk. November 13. — 29, 1878. Colt & Morton, JJ., absent.

At the trial in the Superior Court of charges of fraud, under the Gen. Sts. *c.* 124, § 31, against a person applying to take the oath for the relief of poor debtors, after the reading of the copies sent up by the magistrate, the debtor moved to dismiss, assigning the reason therefor. *Held*, that the motion was seasonably made.

An appeal from the judgment of a magistrate upon charges of fraud, under the Gen. Sts. *c.* 124, § 31, against a person applying to take the oath for the relief of poor debtors, by which the debtor is adjudged guilty of some of the charges and not guilty of others, vacates the whole judgment, and opens the case for trial upon all the charges.

Charges of fraud were filed, under the Gen. Sts. *c.* 124, § 31, against a person applying to take the oath for the relief of poor debtors, the first of which alleged that since the debt was contracted or cause of action accrued, for which the debtor had been arrested, he had fraudulently conveyed, concealed, or otherwise disposed of some part of his property and estate, with a design to secure the same to his own use, or defraud his creditors. The fourth charge alleged that the debtor, on a certain day, made a conveyance of certain personal property (describing it) to a certain person, and that the conveyance was made after the debt was contracted and the cause of action accrued, for which the debtor was arrested, and with a design to secure the same to his own use, and to defraud his creditors, and that the said conveyance was made without consideration; but did not allege that the property was the property of the debtor. *Held*, that the fourth charge was in the nature of a specification under the first, and must be construed in connection with it.

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CHARGES OF FRAUD, filed under the Gen. Sts. c. 124, § 81, upon the defendant's application to be admitted to take the poor debtor's oath. The first and fourth charges were as follows:

"First. That since the debt was contracted or cause of action accrued, for which said George Donegan has been arrested in this case, the said George Donegan has fraudulently conveyed, concealed, or otherwise disposed of some part of his property and estate, with a design to secure the same to his own use, or defraud his creditors."

"Fourth. That the said George Donegan, on or about August 15, 1875, made a conveyance of certain personal property, to wit, certain buildings situated on leased land, and numbered 203 on West First Street in that part of Boston called South Boston, together with the stock, tools, and fixtures in said buildings contained, also a certain building on leased land, used in connection with the above as a barn, and upon the same premises, together with a certain horse, cart, sleigh, and harness, to one Augustine Donegan; and that said conveyance was made after the debt was contracted and the cause of action accrued, for which said George Donegan has been arrested in this case, and with a design to secure the same to his own use, and to defraud his creditors, and that the said conveyance to the said Augustine Donegan was made without consideration."

The second and third charges set forth like conveyances of the debtor's title and interest in lands described in certain deeds annexed.

At the hearing before the magistrate, the debtor was found guilty and sentenced to imprisonment upon the fourth charge, and was found not guilty of the other charges, and appealed to January term 1877 of the Superior Court.

The case came on for trial at January term 1878. After the reading of the copies sent up by the magistrate, the debtor moved to dismiss, for the reason that the fourth allegation contained no charge upon which the debtor could be tried, inasmuch as the property therein alleged to have been conveyed was not alleged to have been the property of the debtor.

Rockwell, J. ruled, "that the motion to dismiss was properly filed; that the fourth allegation did not aver that the property conveyed was the property of the defendant; that the fourth alle-

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gation did not state a charge upon which the defendant could be tried under these proceedings; that the fourth allegation was the only allegation before the court, and that no reference could be had to any other allegation contained in the charges, for explanation or otherwise, in aid of the fourth allegation;" and ordered the case to be dismissed. The plaintiff alleged exceptions.

H. J. Edwards, for the creditor.

G. H. Towle, for the debtor.

GRAY, C. J. It was rightly ruled that the motion to dismiss was seasonably made. *Chamberlain* v. *Hoogs*, 1 Gray, 172. But the other rulings were erroneous. Upon the appeal from the judgment of the magistrate, the case stood for trial in the Superior Court upon all the charges. *Morse* v. *Dayton*, 125 Mass. 47. The fourth charge is in the nature of a specification under the first, and must be construed in connection with it; and a reference to the first charge clearly shows that the property conveyed was the property of the debtor. *Stockwell* v. *Silloway*, 100 Mass. 287. *Anderson* v. *Edwards*, 123 Mass. 273.

Exceptions sustained.

WILLIAM LINTON *vs.* GEORGE R. HICHBORN and another.

Suffolk. November 25. — 29, 1878. COLT & MORTON, JJ., absent.

In an action by the purchaser of real estate at a sale by auction to recover back the part of the purchase money paid at the sale, the judge, who tried the case without a jury, ordered judgment for the plaintiff, and allowed a bill of exceptions, which stated that after the sale, and before the tender of the deed, some person had injured the estate by unhinging and breaking one of the blinds, breaking two panes of glass in a window, making a hole in the ceiling of one room, breaking through an inner door, and carrying away a piece of water-pipe five or six feet long; that the defendant offered to repair the injuries or to compensate the plaintiff for them; and that the judge refused to rule, as requested by the defendant, that these facts did not constitute in law a breach of the contract on the part of the vendor such as would release the purchaser from his obligation, and entitle him to recover back the part of the purchase money already paid. *Held*, that the exceptions did not disclose the nature and degree of the injuries to the property with sufficient fulness and distinctness to enable the court to determine that the refusal to rule as requested was erroneous.

CONTRACT upon an account annexed to recover back $300 paid on account of the purchase money, which was $2,500, of a

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parcel of real estate sold by auction to the plaintiff. Answer, a general denial. Trial in the Superior Court, before *Bacon*, J., without a jury, who allowed the following bill of exceptions.

"The plaintiff signed the written conditions of sale, the material part of which was as follows: '$300 to be paid at sale, one half of the whole purchase money to be paid in cash, balance to remain on mortgage power of sale for three years at seven per cent interest. Taxes for the present year to be paid by the purchaser. Deed to be ready at the office of George R. Hichborn & Co., No. 63 Court Street, on or before fifteen days (or as soon as the papers can be completed) from the day of sale.'

"It appeared in evidence that after the sale, and before the tender of the deed of the premises to the plaintiff, some person had injured the estate by unhinging and breaking one of the blinds, breaking two panes of glass in one of the windows, making a hole in the ceiling of one of the rooms, breaking through one of the inner doors, and cutting and carrying away a piece of water-pipe five or six feet long. It did not appear that the vendor of the house, which was occupied by her tenants, she herself living in an adjoining house, or the defendants, had knowledge of these injuries until the plaintiff mentioned them at the time of the tender of the deed, and by reason of them refused to accept the deed. It also was in evidence that, when the plaintiff mentioned these injuries, the defendants offered to repair them, or to compensate the plaintiff for them by an allowance in money.

"The defendants requested the presiding judge to find that these facts did not constitute in law a breach of the contract on the part of the vendor such as would release the purchaser from his obligations, and render the defendants liable to the present action. But the judge declined so to find; but he did find that, by reason of such injuries, the plaintiff was released from his obligation to take the house; and ordered judgment for the plaintiff for the sum of $300 and interest." The defendants alleged exceptions.

W. C. Williamson, for the defendants.

D. B. Gove, for the plaintiff.

By the Court. This court cannot revise the finding in matter of fact of the judge by whom the case was tried without a jury. The bill of exceptions fails to show that the judge

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made any ruling in matter of law, beyond declining to rule that the facts which the evidence tended to prove did not constitute in law such a breach of the contract, on the part of the vendor, as would release the purchaser from his obligations, and entitle him to recover back the part of the purchase money already paid; and does not disclose the nature and degree of the injuries to the property with sufficient fulness and distinctness to enable this court to determine that the refusal so to rule was erroneous.

Exceptions overruled.

WILLIAM LINTON *vs.* GEORGE R. HICHBORN and another.

Suffolk. November 25. — 29, 1878. COLT & MORTON, JJ., absent.

A valid attachment for a substantial amount, placed on the estate of a vendor of land, after the sale and before the tender of the deed, is such an incumbrance as, in a court of law, justifies the purchaser in refusing to accept the deed, and in recovering back the part of the purchase money already paid, where the conditions of sale provide that the deed is to be ready "on or before fifteen days, or as soon as the papers can be completed, from the day of sale."

CONTRACT upon an account annexed to recover back $300, paid on account of the purchase money of a parcel of real estate bought by the plaintiff at a sale by auction. Answer, a general denial.

At the trial in the Superior Court, before *Bacon*, J., without a jury, it appeared that the conditions of sale, signed by the plaintiff, were as follows:

"South Boston, July 20, 1877. Conditions of sale of house No. 69 A Street: $300 to be paid at sale, one half of the whole purchase money to be paid in cash, balance to remain on mortgage power of sale for three years at seven per cent interest. Taxes for the present year to be paid by the purchaser. Deed to be ready at the office of George R. Hichborn & Co., No. 63 Court Street, on or before fifteen days (or as soon as the papers can be completed) from the day of sale. George R. Hichborn & Co., Auctioneers and agents for the owner, E. McDermott.

"South Boston, July 21, 1877. Having purchased house No. 69 A Street this day at auction for the sum of $2,275, I hereby agree to conform to the conditions of said sale. William Linton."

It further appeared that, after the sale, certain defects in the

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title were discovered and releases procured, to which the plaintiff made no objection; and on August 17, 1877, a deed of the estate was tendered by the defendants to the plaintiff, which he refused to accept, on the ground that there was an attachment upon the property; and in fact, after the sale, the estate was attached, and the attachment existed at the date of the tender.

The defendants offered to prove that the attachment was not known to them until they were informed of it by the plaintiff at the time of the tender of the deed; that, had they been informed of it, they would have taken measures to release it; and that they so stated to the plaintiff. But the judge ruled that the attachment was such an incumbrance as justified the plaintiff in refusing to accept the deed, whether the defendants knew of the existence of the attachment or not; and found for the plaintiff for the amount claimed. The defendants alleged exceptions.

W. C. Williamson, for the defendants. 1. The plaintiff waived all objection to the deed, except as to the existing attachment. *Gerrish* v. *Norris*, 9 Cush. 167. *Dresel* v. *Jordan*, 104 Mass. 407.

2. The defendants do not contend that the plaintiff was bound to take a title incumbered by an attachment, but, as they were ignorant of the existence of the attachment, they contend that its existence was not, of itself, proof of a breach of their contract. The defendants were, in good faith, and with the acquiescence of the plaintiff, doing all they could to perfect the title. "The fact of there being imperfections in the title at the time of the contract will form no ground of objection thereto if such objections can be removed before the time of completing the purchase." 1 Chit. Con. (11th Am. ed.) 431.

D. B. Gove, for the plaintiff.

BY THE COURT. The attachment admitted to have existed, although unknown to the vendors, at the date of the tender of the deed, (assuming it, as we are bound to do upon this bill of exceptions, to have been a valid attachment for a substantial amount,) was such an incumbrance as, in a court of common law, justified the purchaser in refusing to accept the deed and in recovering back the part of the purchase money already paid. *Swan* v. *Drury*, 22 Pick. 485. *Packard* v. *Usher*, 7 Gray, 529. *Barnard* v. *Lee*, 97 Mass. 92. *Brigham* v. *Townsend*, 119 Mass. 287. *Exceptions overruled.*

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COMMONWEALTH *vs.* HOWARD A. RICHARDSON.

Franklin. Sept. 17. — Nov. 9, 1878. ENDICOTT & SOULE, JJ., absent

An indictment, on the Gen. Sts. c. 165, § 4, for polygamy, alleged that the defendant, on a certain day, was lawfully married to A.; and that afterwards, on a certain day, he "did unlawfully marry and take to his wife one B., he, the defendant, then and there being married and the lawful husband of the said A., she the said A. being his lawful wife, and living, and he, the said defendant, never having been legally divorced from the said A." It appeared in evidence that the defendant was lawfully married to A.; that afterwards she was duly divorced from him for misconduct on his part; and that he then married B. *Held*, that there was a variance between the allegations and the proof.

INDICTMENT on the Gen. Sts. *c.* 165, § 4, averring that Howard A. Richardson, on August 6, 1848, at Foxborough, "being then and there a single man unmarried, was lawfully married to one Almira F. Belcher, and her the said Almira F. Belcher then and there had and took for his the said Howard A. Richardson's wife, and cohabited with her as his lawful wife, and that afterward he, the said Howard A. Richardson, on the seventeenth day of October, in the year of our Lord one thousand eight hundred and seventy-six, at Shutesbury, in the county of Franklin, did unlawfully marry and take to his wife one Mary E. Flagg, he, the said Howard A. Richardson, then and there being married and the lawful husband of the said Almira F. Belcher, she the said Almira F. Belcher being his lawful wife, and living, and he, the said Howard A. Richardson, never having been legally divorced from the said Almira F. Belcher, and that the said Howard A. Richardson afterward did cohabit and continue to cohabit with the said Mary E. Flagg, as his second wife, in this state, to wit, at New Salem, in the county of Franklin, for a long space of time, to wit, for the space of one year; whereby and by force of the statute in such case made and provided he, the said Howard A. Richardson, is deemed guilty of the crime of polygamy. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Howard A. Richardson in manner and form as aforesaid at New Salem aforesaid, on the first day of January now last past, did commit the crime of polygamy."

At the trial in the Superior Court, before *Pitman*, J., it appeared that Almira F. Belcher, named in the indictment, was

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lawfully married to the defendant and cohabited with him as his wife for some years; that in March, 1857, she was duly divorced from him by a decree of the Supreme Judicial Court, sitting in the county of Norfolk, dissolving the bonds of matrimony between them for misconduct on his part; and that thereafterwards she married one Eddy, since deceased. The government offered evidence tending to prove the other essential allegations in the indictment.

The defendant contended that there was a variance between the proof and the allegations of the indictment, as to the first wife; and that upon these facts it was not competent for the jury to convict the defendant on this indictment. But the judge ruled otherwise; the jury returned a verdict of guilty; and, the question of law arising at the trial, being in the opinion of the presiding judge so doubtful as to require the decision of this court, was reported, at the request of the defendant, for its determination.

A. De Wolf, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

LORD, J. The status of a party, whose contract of marriage has been judicially dissolved for his fault, has not, in this Commonwealth, been precisely defined. In *Commonwealth* v. *Putnam*, 1 Pick. 136, Mr. Justice Wilde says: "By the divorce, the first marriage was dissolved, and, but for the second section of the act of 1784, *c.* 40, the second marriage would have been lawful by our laws;" and adds: "Notwithstanding the restraints imposed on the husband, he being the guilty cause of the divorce, the dissolution of the marriage contract was total, and not partial." In *West Cambridge* v. *Lexington*, 1 Pick. 506, Chief Justice Parker, in giving the opinion of the court, speaks of such party as "not being in a legal sense a married man, and perhaps not to be considered as having a former wife living, the decree of divorce having terminated the relation of husband and wife." We do not deem it necessary in this case to determine whether any or what marital duties or obligations remain upon such person.

By the Gen. Sts. *c.* 165, § 4, it is enacted that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall (except in the cases mentioned in the following section) be deemed guilty of polygamy." The following section

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is in these words: "The provision of the preceding section shall not extend to any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other, and remained absent for the space of seven years together, the party marrying again not knowing the other to be living within that time, nor to any person legally divorced from the bonds of matrimony, and not the guilty cause of such divorce." This statute is substantially the same as the St. of 1784, *c.* 40; and from that time, and for a period long before, to the present, has been in substance the law of the Province and the Commonwealth. The same provisions were incorporated into the Rev. Sts. *c.* 130.

In *Commonwealth* v. *Putnam*, *ubi supra*, the guilty party in the divorce suit married again in another state, and was indicted for the crime of adultery in this state. In *Commonwealth* v. *Hunt*, 4 Cush. 49, the guilty party married again, also in another state, and the indictment charged her with lewd and lascivious cohabitation in this state with the party to whom she claimed to be married. In each of these cases the court held that the offence charged was not the offence committed. In the former case, the jury found a special verdict establishing the facts of the former marriage, the divorce for the defendant's adultery, his second marriage in Connecticut and his cohabitation in this state. Lincoln, in behalf of the defendant, in argument, is reported as saying, "Johnson defines adultery 'the act of violating the bed of a married person.' The defendant has not done this. He has not violated any plighted faith to his former wife." "The indictment might as well have been for polygamy as for adultery;" "though in truth he could not be indicted for either, unless he were a married man at the time of the second marriage." In declaring the result at which the court arrived, Mr. Justice Wilde utters the dictum, "The defendant should have been indicted on the second section of the act referred to," which is substantially the same as the Gen. Sts. *c.* 164, §§ 4, 5. Although a dictum by that magistrate is always entitled to most respectful consideration, it is not to be regarded as the judgment of the court. The dictum is however qualified by the statement, "The second marriage, with all the other facts constituting the crime of polygamy, should have been set forth in

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the indictment, so that the defendant might have been prepared to answer and defend himself;" showing that that learned judge deemed it necessary that the divorce and the subsequent marriage of the guilty party should be alleged in the indictment. 1 Pick. 139. In the latter case, Mr. Justice Dewey speaks more cautiously, and says, "If the facts in this case afford ground for any indictment under the Rev. Sts. *c.* 130, it would be more properly an indictment upon the second section, for unlawfully cohabiting within the state, with Davis, as husband and wife, the defendant having a former husband living, and not coming within the exception of the third section, as a person 'not the guilty cause of the divorce;'" decisively intimating that, if the indictment could be maintained under that statute, it must aver the facts which bring the party within its terms. 4 Cush. 50.

In *Commonwealth* v. *Lane*, 113 Mass. 458, the question presented in this case did not arise, and was not considered by the court; for, although the defendant was charged with polygamy, under the same statute, for marrying a second time during the life of the former wife, the defence was that his marriage was a legal marriage under the law of the State of New Hampshire where it was consummated, and the court so held.

These three cases, it is believed, are the only ones which have been decided in this Commonwealth in which the subsequent marriage of the guilty divorced party has been before the court upon an indictment. It is certain, that it has never been decided by this court that such party can be convicted of polygamy under the provisions of the Gen. Sts. *c.* 165, § 4, or the previous statutes of the same character. Nor do we deem it necessary, for reasons hereafter to be stated, now to decide that question.

If that question could be presented nakedly, it would be a matter deserving of grave consideration whether the party charged could be said in criminal pleading to be one having a husband or wife living, or as being a lawful husband or wife, but we are quite certain that the facts should be stated which bring the party within the provisions of the statute. It is to be noticed that the exceptions in the statute are not such as are ordinarily introduced in legislation affecting the act done, but relate entirely to the person, and without these exceptions the law would perhaps be construed the same as with them. See

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Commonwealth v. *Jennings*, 121 Mass. 47. But two classes of persons are referred to in the provisos. The first class includes "any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other, and remained absent for the space of seven years together, the party marrying not knowing the other to be living." In such case the party is presumed to be dead; and although, if he or she should return, the marriage might be void, it certainly would be straining the law to hold such one criminally guilty in doing an act which he or she, by law, might properly presume to be a lawful act. *Commonwealth* v. *Thompson*, 6 Allen, 591, and 11 Allen, 23. The other class includes such as are lawfully divorced, being innocent. Under the law he or she is entitled to have the marriage contract dissolved. Certainly, without any proviso or exception no such person, on marrying again, could be deemed to be guilty of polygamy; and it is not improbable that the exception was inserted out of extreme caution, and possibly because the act of 1784 had an exception of a similar character. It was this: "Provided also, that this act or anything therein contained shall not extend to the wife of any married man who shall willingly absent himself from his said wife, by the space of seven years together, without making suitable provision for her support and maintenance in the mean time, if it shall be in his power so to do."

The St. of 1784 was but a reënactment, with of course a different penalty, of the Province law of 6 W. & M. (1694–5) *c.* 5, against polygamy, with a proviso in relation to continuous absence in almost the identical language of the Gen. Sts. *c.* 165. 1 Prov. Laws, (State ed.) 171. The St. of 6 W. & M. *c.* 5, contains also a proviso excepting from its operation divorced parties, but does not distinguish between the guilty and innocent party; its language being, "shall not extend to any person or persons, that are or shall be at the time of such marriage divorced by any sentence had, or hereafter to be had, as the law of the Province in that case has provided."

Whether the guilty party would at that time have been deemed a divorced party, it is not necessary to inquire. Four years later, by St. 10 W. III. (1698) *c.* 19, the proviso in relation to time of absence was modified, and it was enacted, "that if any

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married person, man or woman, has lately or shall hereafter go to sea in any ship or other vessel, bound from one port to another, where the passage is usually made in three months' time, and such ship or other vessel has not been, or shall not be heard of within the space of three full years next after their putting to sea from such port, or shall only be heard of under such circumstances, as may rather confirm the opinion, commonly received, of the whole company's being utterly lost, in every such case, the matter being laid before the Governor and Council, and made to appear, the man or woman, whose relation is in this manner parted from him or her, may be esteemed single and unmarried; and upon such declaration thereof, and license obtained from that board, may lawfully marry again; any law, usage, or custom to the contrary notwithstanding." 1 Prov. Laws, 353.

Such being the history of the law and its condition till 1841, we feel warranted in inferring that, at that time, the Legislature did not deem the marriage of the guilty party who had been divorced to be polygamy; for in that year was enacted the following statute: "Whenever a divorce from the bond of matrimony shall be decreed for any cause allowed by law, the guilty party shall be debarred from contracting marriage during the lifetime of the innocent party; and if the guilty party shall contract such marriage, the same shall be void, and such party shall be adjudged guilty of polygamy." St. 1841, *c.* 83. This is substantially reënacted in the Gen. Sts. *c.* 107, § 25.

This kind of legislation has many precedents. Any person who embezzles property is deemed by the statute to have committed the crime of larceny; it is not sufficient, however, in an indictment for such offence, simply to charge stealing in the usual manner, but the facts which constitute the embezzlement must be set out, with the averment of the legal conclusion that thereby and by force of the statute the party charged has committed the crime of larceny.

If, however, we assume that, prior to the St. of 1841, a divorced party, being the guilty cause of the divorce, might be guilty of polygamy by marrying again during the life of his former wife, still the result must be the same, in this case, as if no such offence could, prior to that statute, be committed; for it is quite clear that, under the existing statutes, the crime of

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polygamy may be committed by persons under entirely diverse circumstances, and, by the familiar rules of pleading, a party charged with an offence is entitled to a statement in the indictment of the facts which constitute the offence; and, if an offence may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial; and when one mode is stated and proof of the commission of the offence by a different mode is offered, such evidence is incompetent by reason of variance. It is clear, therefore, that, whether we decide that the offence of polygamy might have been committed by the guilty divorced party or not, the result must be the same; for the facts proved would show either that no crime was committed, or, if committed, there was a variance between the allegata and the probata.

New trial ordered.

COMMONWEALTH *vs.* LUKE K. BLAIR.

Hampshire. Sept. 17. — Nov. 16, 1878. ENDICOTT & SOULE, JJ., absent.

On the trial of an indictment for procuring an abortion, there was evidence that cuts, wounds and bruises were found in the womb of the woman upon whom the operation was alleged to have been performed, indicating the forcible use of some instrument, and that the defendant had the opportunity to commit the crime. *Held*, that evidence that, five months before the time of the alleged operation, the defendant had in his possession an instrument which he described as well fitted to procure an abortion, was admissible.

The admission of additional evidence, offered by the government, after the defendant in a criminal case has put in his evidence, is not the subject of exception.

INDICTMENT in two counts. The first count, upon which alone the defendant was convicted, charged that the defendant, on December 5, 1876, at Pelham, "unlawfully and maliciously did thrust a certain instrument, the name of which is to the jurors aforesaid unknown, into the body and womb of one Mary M. Wilson, then and there being pregnant with child, with intent thereby then and there to cause the said Mary M. Wilson to miscarry and prematurely bring forth from her body the said child with which she was then and there pregnant."

At the trial in the Superior Court, before *Gardner*, J., the

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government offered evidence tending to show that Mrs. Wilson had a miscarriage, at Pelham, on December 7, 1876, resulting in her death on December 16, 1876, and that, after death, cuts, wounds and bruises were found in her womb, caused by some instrument used therein with violence.

The government also offered evidence that the defendant, who resided in Holyoke, was, on December 5, 1876, taken to Pelham by the husband of Mrs. Wilson, and passed the night at the house of Wilson, returning to Holyoke on the next day; that he said to the officer, when arrested, that he did not think Wilson would have gone back on him; and that he attempted to escape trial by secretly going to Canada after a former trial.

The defendant testified that he was a practising physician and surgeon at Holyoke, denied that he procured any abortion on Mrs. Wilson, and explained the occasion of his visit to Pelham. Upon cross-examination, he was asked if he had not, at the time of the alleged offence, an instrument for procuring abortions, and he answered that he had never had any such. He was then asked if he did not have one at the time that a Mrs. Myrick was at his office in Holyoke, at a time prior to December 5, 1876, and he said that he never had any then or at any other time. The government, after the defendant's testimony was in, called Mrs. Myrick as a witness, and offered to show that, in July or August, 1876, the defendant had in his possession an instrument adapted to the purpose of procuring abortions, which instrument, the government contended, could have made the wounds found in the womb of Mrs. Wilson, and was evidence tending to show that the defendant had an instrument by means of which the wounds might have been caused at the time of the commission of the crime. The district attorney, on being asked, would not say that he omitted the testimony of the witness Myrick, when putting in the case of the government, unintentionally, but said he had been expecting to elicit the facts from the defendant on cross-examination. The defendant excepted to the admission of the testimony as unseasonable and incompetent; but the judge admitted the testimony, and the witness testified that she was at the defendant's house in Holyoke, in July or August, 1876, and saw a metallic instrument in the defendant's hands, in two parts, about a foot long, round and hollow, and that the defendant said

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it was the best kind of instrument for procuring an abortion, because safer than another kind.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. G. Bassett, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The evidence objected to had a tendency to show that the defendant had in his possession, not long before the sickness and death of Mrs. Wilson, a metallic instrument which the jury might believe adapted to the use described in the indictment; and that he understood and described it as well adapted to such a use, and safer than other instruments that might be employed for such a purpose. Evidence had already been given for the purpose of showing the existence of cuts, wounds, and bruises in the womb of the deceased, such as indicated the forcible use of some instrument. All this, taken in connection with previous testimony, tended to show that the defendant had the opportunity, and was knowingly in possession of the means, of committing such a crime, and the evidence was therefore competent and admissible. Its weight and effect were of course to be judged of by the jury. *Commonwealth* v. *Brown*, 121 Mass. 69.

Its admission after the defendant had closed his case was a matter of judicial discretion, and not a subject of exception. *Commmonwealth* v. *Arrance*, 5 Allen, 517. See also *Foot* v. *Hunkins*, 98 Mass. 523. *Exceptions overruled.*

COMMONWEALTH *vs.* LEVI BRADFORD.

Hampshire. Sept. 17.—Nov. 18, 1878. ENDICOTT & SOULE, JJ., absent.

On the trial of an indictment for the malicious burning of a building on a certain day, it is competent for the government to show, on the question of the intent with which the defendant burned the building on that day, that the defendant set fire to the same building three days before.

On the trial of an indictment for the malicious burning of a building, the voluntary testimony of the defendant before a fire inquest, reduced to writing and signed by him, is admissible against him.

On the trial of an indictment for the malicious burning of a building, after it has appeared that the defendant had conveyed the building to his sons, subject to a

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mortgage made by him, they assuming to pay the mortgage note, evidence that, a month before the fire, the defendant suggested to an insurance broker that there should be an increase of insurance on the building, is admissible to show that he had a motive to commit the offence.

INDICTMENT in three counts. The second count, upon which alone the defendant was convicted, charged that the defendant, on February 14, 1878, at Williamsburg, "feloniously, wilfully, and maliciously did set fire to, burn, and consume a certain grist mill and shop there situate, of the property of Herbert L. Bradford and Gilbert M. Bradford, of said Williamsburg; which grist-mill and shop was then, to wit, at the time of committing the felony aforesaid, insured against loss and damage by fire, with intent of him the said Levi Bradford thereby then and there to injure a certain insurance company called the Springfield Fire and Marine Insurance Company, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

At the trial in the Superior Court, before *Gardner*, J., the government offered evidence tending to show that the two sons of the defendant, named in the indictment, owned a grist-mill and shop, situate in Williamsburg, which was burned on February 15, 1878; that the same had been conveyed to them by the defendant, by deed dated September 1, 1875, subject to a mortgage made by him to the Haydenville Savings Bank, dated February 15, 1875, to secure his note for $2400 payable on demand; that it was understood that the two sons were to assume payment of this mortgage note; that a brother of the defendant was surety upon this note, and desired to be released therefrom; that payment had been demanded of the defendant by the bank; that the defendant, on January 30, 1878, had promised to pay the note on February 10 following, or a few days after; that there were two policies of insurance upon the property burned, one of which, for $2000, was made by the Springfield Fire and Marine Insurance Company of Springfield, dated May 30, 1877, for the term of one year; and that the bank received from this insurance company, on April 28, 1878, $1797.30, which it applied in part payment of the defendant's note. The evidence relied on by the government to convict the defendant was circumstantial.

The government also offered evidence tending to show that

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about seven o'clock in the evening of February 12, 1878, the defendant set the mill on fire, which fire was discovered by a neighbor and extinguished. The defendant objected to this evidence, but the judge admitted it, carefully instructing the jury, as requested by the defendant, as to its effect and purpose, and that the only use to which the jury could apply it was as to the intent with which the defendant burned the mill on February 15, as charged in the indictment, if they found him guilty of such burning.

The government also put in evidence a written statement of evidence given by the defendant at a fire inquest, held after the property was burned, which was read over to and signed by him. The defendant objected to all that part thereof relating to the fire of February 12. It was not contended by the defendant that this statement was not made by him voluntarily.

George F. Smith, an insurance broker, testified, subject to defendant's exception, that on January 11, 1878, he had a talk with the defendant at Williamsburg, in which the defendant said the boys were not fully insured, and could n't he go up and see the boys about it.

The jury returned a verdict of guilty on the second count; and the defendant alleged exceptions.

C. Delano, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

COLT, J. The defendant was indicted for wilfully and maliciously burning a building belonging to his two sons. The second count in the indictment charges an intent thereby to defraud the insurer. At the trial evidence was admitted in support of the indictment, against the defendant's objection, tending to prove that the defendant set fire to the same mill a few nights before, and that the fire was then discovered and extinguished by a neighbor.

The evidence was competent on the question of the intent with which the defendant subsequently burned the building, and committed the offence for which he was then tried. It was carefully limited to the single purpose for which it was competent. The unsuccessful attempt to do the same thing, a few days before, was evidence that the burning was wilful and intentional, and not the result of accident or negligence on the part of the defendant. It

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was sufficiently near to the time of the commission of the offence charged, to justify the inference that the defendant then had a settled purpose in regard to it. It is a rule of criminal law, that evidence tending to prove a similar but distinct offence, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged, is not admissible. But there was no invasion of this rule in the admission of this evidence. The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing purpose, which from known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is, that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought to be established existed at the time of the commission of the offence charged. The limit is largely in the discretion of the judge, and no error in law is here apparent.

The case at bar is not distinguishable upon this point from *Commonwealth* v. *McCarthy*, 119 Mass. 354, where, on the question of intent, the government was permitted to show that the defendant a few days before set fire to a shed, ten feet distant from the building burned, and connected therewith by a flight of steps. The defendant in that case was the owner of the building burned, while in this case the defendant had conveyed the property to his sons subject to his mortgage, which was paid in part from the avails of the insurance upon it. It is sufficient that under the second count the jury in this case must have found that the defendant wilfully burned the building with intent to injure the insurer, and this is enough whether he owned the building or not; and besides, the evidence was admissible without reference to the alleged intent to injure the insurer. See also *Thayer* v. *Thayer*, 101 Mass. 111.

The testimony of the defendant taken at the fire inquest was clearly admissible. It is objected "that a judicial oath adminis-

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tered when the mind is agitated and disturbed by a criminal charge, or by suspicion of crime, may prevent free and voluntary mental action." But this objection, if there is anything in it, is not sustained as a matter of fact, for there is nothing in the case to show that he was, at the time his testimony was given, proceeded against criminally, or was then under suspicion of crime. The testimony was given voluntarily, and its weight must depend upon the circumstances under which it was given. *Commonwealth* v. *King*, 8 Gray, 501. *Commonwealth* v. *Reynolds*. 122 Mass. 454.

The defendant's conversation with the insurance broker in January, in which he suggested that there should be an increase of insurance, taken in connection with his liability on the mortgage note which the sons had agreed to assume, tended to show that he had a pecuniary interest in the insurance and a motive to commit the offence charged. *Commonwealth* v. *Hudson*, 97 Mass. 565. *Exceptions overruled.*

COMMONWEALTH *vs.* CHARLES T. DEJARDIN.

Bristol. Oct. 22.—Nov. 11, 1878. ENDICOTT & LORD, JJ., absent.

An indictment, on the St. of 1862, *c.* 168, § 1, alleging that the defendant printed and published obscene pictures of naked girls, is not sustained by proof that he printed and published obscene pictures of girls naked only above the waist.

MORTON, J. The defendant is indicted under the St. of 1862, *c.* 168, § 1, which provides that "whoever imports, prints, publishes, sells, or distributes any book, pamphlet, ballad, printed paper, or other thing containing obscene, indecent or impure language, or any obscene, indecent or impure prints, pictures, figures, or descriptions, manifestly tending to the corruption of the morals of youth; or introduces into any family, school or place of education; or buys, procures, receives, or has in his possession any such book, pamphlet, ballad, printed paper, or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school

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or place of education, shall be punished" by imprisonment in the state prison, or by fine and imprisonment in the jail.

It is clear that this indictment is founded on the first clause of the statute. This clause prohibits the importation, printing, publishing, selling, or distributing "any book, pamphlet, ballad, printed paper, or other thing," containing obscene, indecent or impure language, or containing any obscene, indecent or impure prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of youth. The second and fourth sections, providing for issuing search-warrants for "any obscene, indecent or impure books, pamphlets, ballads, printed papers or other things," tend strongly to show that such is the true construction of the first section. An indictment under this clause should aver that the defendant imported, printed, published, sold, or distributed a book, pamphlet, ballad, printed paper or other thing, describing it, containing obscene or indecent language, or obscene or indecent prints, pictures, figures or descriptions, describing them, or giving an excuse for not particularly describing them. *Commonwealth* v. *Holmes*, 17 Mass. 336. *Commonwealth* v. *Tarbox*, 1 Cush. 66. The general words "or other thing" must be construed to mean or other thing of like kind. The maxim *noscitur a sociis* applies.

The indictment in this case avers that the defendant "unlawfully and scandalously did print and publish certain obscene pictures, figures, and descriptions, to wit, pictures, figures, and descriptions of naked girls, manifestly tending to the corruption of the morals of youth." It is not necessary to decide whether this indictment can be held to be sufficient under the statute. If it can be, there was a fatal variance between the allegation and the proof. The court admitted evidence that the defendant took photographic pictures of two young girls naked down to the waist; and instructed the jury that, if they found such pictures to be obscene and indecent, and to have been delivered to the girls, they should convict the defendant.

This was erroneous. The allegation that the defendant printed and published pictures and figures of naked girls is not met by proof that he printed and published pictures and figures of girls, for the greater part clothed. The government, having described the pictures, is bound by the description, and the defend-

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ant could not be convicted upon proof that he printed and published pictures substantially different from the description, though the jury might find such pictures to be obscene.

Exceptions sustained.

M. Reed & H. A. Dubuque, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* JAMES E. SISSON.

Bristol. Oct. 22. — Nov. 16, 1878. ENDICOTT & LORD, JJ., absent.

At the trial of a complaint on the Gen. Sts. c. 87, §§ 6, 7, charging the defendant with keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence that the defendant lived in the building and occupied the second and third stories, the first floor being used as a bar-room; that the bar-room had one entrance from the street and the upper part of the building another, there being an inside door at the foot of the stairs, leading into the bar-room, so that it was possible to go from the rooms occupied by the defendant to the bar-room without going into the street; that on Sundays a curtain was lowered at one of the bar-room windows exhibiting the inscription "dining-rooms," preceded by the surname of the defendant; that the bar-room was not fitted up as a dining-room. *Held*, in the absence of evidence that any other person bearing the same surname as the defendant had anything to do with the premises, that the evidence was sufficient to justify the jury in finding that the defendant was the proprietor of the place in question.

COMPLAINT on the Gen. Sts. c. 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement in New Bedford, used for the illegal sale and illegal keeping of intoxicating liquors, the same being a common nuisance.

At the trial in the Superior Court, before *Putnam*, J., it was admitted that the place in question was a common nuisance; but the defendant asked the judge to rule that the evidence would not warrant a finding that he kept it. The judge declined so to rule, and submitted the question to the jury, under instructions not objected to. The jury returned a verdict of guilty; and the defendant alleged exceptions. The nature of the evidence appears in the opinion.

H. M. Knowlton, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

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AMES, J. The only question presented by this bill of exceptions is, whether there was any evidence that would authorize the jury to find that the defendant was the proprietor or keeper of the place in question. It appeared that he lived in the same building, and occupied the second and third stories, the first floor being used as a bar-room. The bar-room had a separate entrance, and was numbered 102. The entry, in which was the staircase leading to the second and third stories, had a street door, numbered 104, within two feet of the outer door of the bar-room, and there was also an inside door at the foot of the stairs, leading into the bar-room; so that it was possible to go from the rooms occupied by the defendant to the bar-room without going into the street. There was also the additional fact that on Sundays a curtain was lowered at one of the bar-room windows, exhibiting the inscription "Sisson's Dining Rooms." There was no evidence that any other person named Sisson had anything to do with any part of the premises; and the bar-room was not fitted up as a dining-room.

Whether this evidence ought to have satisfied the jury of the truth of the charge that the defendant was the proprietor or keeper of the place was a question for them, and not for us. We are clearly of the opinion that it was competent, and there is no intimation that it was not submitted to them with proper instructions. Its weight and effect were for them exclusively to estimate. His proximity and means of access to the place, the public use of a surname identical with his own, and the absence of any suggestion that there was any other Sisson, were matters proper for them to consider. *Exceptions overruled.*

COMMONWEALTH *vs.* CELIA C. SLINEY.

Essex. November 8, 1878. ENDICOTT & LORD, JJ., absent.

At the trial of an indictment on the Gen. Sts. c. 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement resorted to for prostitution and lewdness, a witness testified, against the defendant's objection, that he had a conversation on the piazza of the house in question, with a girl; that the defendant was also at the same time out of doors, and from fifteen to twenty

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feet distant from him and the girl; that the girl spoke very loud, and solicited him to have criminal intercourse with her in the house, and stated that the price would be a certain sum, a portion of which she was obliged to pay the defendant. The judge instructed the jury that it was for them to say, upon the evidence, whether the defendant heard the conversation; and that, if they did not find she heard it, they were to disregard the evidence, it being outside of the house. *Held*, that the defendant had no ground of exception.

INDICTMENT, on the Gen. Sts. *c.* 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement in Salisbury, resorted to for prostitution and lewdness.

At the trial in the Superior Court, before *Putnam*, J., it appeared that the defendant kept a house in Salisbury for the accommodation of visitors in the summer time. For the purpose of proving that the place was resorted to for the purposes of prostitution, a witness testified that he had a conversation on the piazza of the house, with a girl; and that the defendant was also at the same time out of doors, and from fifteen to twenty feet distant from him and the girl. There was no evidence as to what the defendant was doing. But the witness testified that, though he spoke in an ordinary tone of voice, the girl spoke very loud, and he thought the defendant heard it; that the girl solicited him to have criminal intercourse with her in the house, and stated that the price would be a certain sum, out of which she was obliged to pay two dollars to the defendant (calling her by name). The defendant objected to the admission of this conversation. But the judge admitted it; and instructed the jury that it was for them to say upon the evidence whether the defendant heard the conversation; and that, if they did not find she heard it, they were to disregard the evidence, it being outside of the house.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. D. Northend, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

THE COURT *Overruled the exceptions.*

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COMMONWEALTH *vs.* EDWARD DONAHUE.

Essex. November 8, 1878. ENDICOTT & LORD, JJ., absent.

If the age of a defendant, in a criminal case, does not appear upon the record, the objection that, under the St. of 1877, c. 210, § 5, the court has no jurisdiction, cannot be availed of by a motion to dismiss or in arrest of judgment.

COMPLAINT to the Police Court of Haverhill charging Edward Donahue with unlawfully keeping intoxicating liquor with intent unlawfully to sell the same. The record, transmitted to the Superior Court on appeal, was in the usual form, and did not state the age of the defendant.

In the Superior Court, before *Bacon*, J., the defendant, before the jury were impanelled, moved to dismiss the complaint for the reason that defendant was, at the time the complaint was issued, and the trial had thereon in the police court, under the age of seventeen years, and was not tried before a session of that court for juvenile offenders, in accordance with the provisions of the St. of 1877, *c.* 210, § 5,* but was tried at a regular session of said court for the transaction of criminal business; that, being of such age, the police court had no jurisdiction in the matter of said complaint, except when in session for the trial of juvenile offenders; and that the Superior Court had no jurisdiction. In support of the motion, the defendant offered to show that he was under seventeen years of age at the time he was tried in the Police Court, and at the time of his trial in the Superior Court. The judge refused to hear the evidence, and overruled the motion.

After a verdict of guilty, the defendant moved in arrest of judgment, assigning the same reasons as in his motion to dismiss. The judge thereupon heard evidence on the question of the age of the defendant, excluded a portion of that offered by

* "The several district, police and municipal courts shall have and exercise, within the districts under the jurisdiction thereof, all the power, authority and jurisdiction that trial justices of juvenile offenders now have; but such offenders shall be tried separate and apart from the trial of other criminal cases, at suitable times to be designated therefor by said courts, to be called the session for juvenile offenders, of which session a separate record and docket shall be kept."

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him, and overruled the motion; and the defendant alleged exceptions.

B. F. Brickett, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The age of the defendant did not appear upon the record, and therefore was not a legal ground of a motion to dismiss, or of a motion in arrest of judgment. *Commonwealth* v. *Fredericks*, 119 Mass. 199. *Commonwealth* v. *Edwards*, 12 Cush. 187. *Exceptions overruled.*

COMMONWEALTH *vs.* THOMAS GATELEY.

Essex. November 8. — 22, 1878. ENDICOTT & LORD, JJ., absent.

An indictment charged A. with the embezzlement of treasury notes and national bank bills. The evidence showed that A. was entrusted by his employer with a bank check payable to bearer, for the purpose of paying a note, without any direction whether to pay the note with the check or to draw the money on the check and then pay the note; that generally notes were paid with checks, but the practice was not uniform; that while the check was in A.'s possession he made up his mind to take his employer's funds in his possession and use them; and drew the money on the check. *Held*, that whether there was a variance was a question for the jury.

INDICTMENT, under the Gen. Sts. *c.* 161, § 88, charging Charles L. Swasey with embezzling "three treasury notes, of the denomination and value of one hundred dollars each, three national bank bills, of the denomination and value of one hundred dollars each, three other notes of kinds to said jurors unknown, of the denomination and value of one hundred dollars each, divers other notes of kinds and denominations to said jurors unknown, of the value of one thousand dollars, all of said notes and bills being then and there current as money," and the defendant with feloniously receiving and aiding in concealing the same.

At the trial in the Superior Court, before *Pitman*, J., Swasey testified, for the government, that, at the time of the embezzlement, he was a clerk in the employ of the firm of Henry Poor & Son; that he had general charge of the firm's bank account; that on the day of the embezzlement he went to the Hide and Leather Bank, with the firm's bank book containing a number of checks

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to make a deposit; that he also took with him the firm's check on that bank for $2350, for the purpose of paying a note of the firm for that amount, due that day and payable at the Bank of the Commonwealth; that he deposited the checks, with the exception of the one for $2350, which he retained in his possession, and went to dinner; that while at dinner he thought of taking the funds of the firm in his possession and using them; and finally made up his mind so to do; that instead of going to the Bank of the Commonwealth and paying the note with the check, he returned to the Hide and Leather Bank, drew the money upon the check, and used it. On cross-examination, he testified that he received no direction from his employers whether to pay the note with the check, or to draw the money and pay the note with it; that there was no unvarying custom of the firm in this respect, but generally notes were paid with checks; that in this case, if he had intended to pay the note with the check, he should not have drawn the money thereon, on account of the inconvenience of carrying so large a sum of money; and that the check in question was made payable to bearer.

John O. Poor, one of the firm, testified that this check was delivered to Swasey, and it was his duty to pay the note; that he presumed the course of business was to draw the money on checks and pay notes, but understood it was not the universal practice.

The defendant asked the judge to rule that there was a variance, as the evidence showed that a check was embezzled, and not treasury notes and bank bills, as alleged in the indictment. The judge declined so to rule, and ruled that it was a question for the jury whether Swasey embezzled a check or treasury notes and bank bills.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. S. Knox, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The indictment charges that Swasey embezzled treasury notes and national bank bills. The defendant contends that the evidence showed an embezzlement of a bank check, and therefore that there was a variance. But we are of opinion that the court properly left this question to the jury.

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The evidence tended to show that Swasey had the right, in the course of his duty, to present the check at the bank, and draw the money upon it. There was no evidence that he made any use of the check except to draw the money upon it. The jury might well find, upon the evidence, that there was no misappropriation or conversion of the check, and that the embezzlement by Swasey of the property of his employers was not completed until after he had drawn the money from the bank.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM GALLAGHER.

Suffolk. November 25. — 27, 1878. COLT & MORTON, JJ., absent.

An indictment for larceny described the property taken as "divers promissory notes payable to the bearer on demand, current as money in said Commonwealth, of the amount and of the value of eighty dollars, a more particular description of which is to the jurors unknown." *Held*, in the absence of evidence that the grand jury had a full description of the property taken, that an instruction, requested by the defendant, that, if the jury should find that the grand jury had a full description, they should acquit, was properly refused.

On an indictment for larceny, it is not necessary to prove that the amount of the property stolen is not more than the amount alleged.

An indictment for the larceny of "divers promissory notes payable to the bearer on demand, current as money in said Commonwealth," is sustained by proof of stealing bank bills.

If in a criminal case the defendant testifies, and the record of his prior conviction and sentence in another case is put in evidence to impeach him, such record is conclusive evidence of such conviction and sentence; and his testimony that he was innocent, and that the officer, who made the complaint in that case, afterwards told him that he was satisfied of his innocence, is immaterial.

A witness, who testifies in a criminal case in favor of the defendant, may be asked, on cross-examination, if he has offered a certain person money to be a surety on the defendant's bail bond.

INDICTMENT, charging the defendant with the larceny, on September 19, 1878, from the person of John Sheridan, of "divers promissory notes, payable to the bearer on demand, current as money in said Commonwealth, of the amount and of the value of eighty dollars, a more particular description of which is to the jurors unknown."

At the trial in the Superior Court, before *Putnam*, J., Sheri-

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dan testified that his wallet, containing eighty dollars in bank bills, one twenty-dollar bill, six five-dollar bills, and three ten-dollar bills, was taken from him by the defendant on the day alleged in the indictment; that in addition to these bills, the wallet contained two or three small bills, ones and twos, left from a five-dollar bill, which he had got changed during the day; that he testified before the grand jury that he had the eighty dollars, but did not mention the other small bills, or tell what the denominations of the bills were; and that he thought no question was asked him about it.

Upon this evidence, the defendant requested the judge to instruct the jury as follows: "1. If the grand jury had a full description of the bills, and if the jury so find on the evidence, it is not competent for the government to say that a more particular description of their value was to them unknown; and the jury should for that reason acquit. 2. The government must prove to a moral certainty that the bills were of the precise amount and value of eighty dollars, neither more nor less; and if, upon the evidence, the government has not satisfied the jury of that precise amount, beyond legal doubt, the jury should for that reason acquit. 3. It is not competent for the government, under the description in the indictment, to ask a conviction for the larceny of national bank bills; and if, upon the evidence, the jury find that such were the 'promissory notes' lost by Sheridan, they should acquit the defendant." The judge declined to give these instructions.

The defendant called as a witness one Clark, whose evidence tended to confirm that of the defendant, and to contradict that of Sheridan, as to what transpired at the time of the taking. On the cross-examination of Clark, the government asked him if he was not a friend of the defendant; to which he replied that he was not. He was then asked, "Did you not offer one Alley, or somebody else, forty dollars to go bail for the defendant in this case?" The defendant objected to this question; but the judge allowed it to be put, and the witness answered, "I offered Alley fifteen dollars if he would go on the defendant's bond."

For the purpose of affecting the credibility of the defendant, who offered himself as a witness, the government introduced in evidence a record of his prior conviction and sentence for larceny.

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The defendant was allowed to testify, that, although he was convicted, he was innocent; and that the officer, who made the complaint in that case, subsequently told him that he was satisfied of his innocence. This officer was a witness for the government, and was also present at the time the defendant made this statement, but was not recalled by the government to contradict it. The defendant asked the judge to instruct the jury, that, if they believed that the officer told the defendant he was satisfied that he was innocent, that nullified the record. The judge declined to give these instructions.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

G. W. Searle & G. L. Ruffin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The instructions requested were rightly refused. There was no evidence that the grand jury had a full description of the bills, and it was not necessary to prove that the amount of bills stolen was not more than was alleged. *Commonwealth* v. *Hussey*, 111 Mass. 432. It is settled by our decisions, that an indictment for stealing "promissory notes" is supported by proof of stealing bank bills. *Commonwealth* v. *Butts*, 124 Mass. 449. The record introduced was conclusive evidence of the conviction and sentence, and all the testimony afterwards admitted on that point was immaterial. The cross-examination of the witness Clark was within the discretion of the presiding judge.

Exceptions overruled.

COMMONWEALTH *vs.* EDWARD FRAHER.

Norfolk. Nov. 25. — 26, 1878. COLT & MORTON, JJ., absent.

At the trial of an indictment on the Gen. Sts. c. 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence that the defendant occupied a building, using part of it for a dwelling and the rest for other purposes; that, during part of the time covered by the indictment, he used one room for the sale of liquors, and during the rest of the time another room adjoining the first. The judge declined to rule that the government must elect as to which tenement or room it would rely upon; and instructed the jury that a tenement might consist of

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two rooms used together and immediately connected together, and that, if the two were thus used alternately and interchangeably for the illegal sale or the illegal keeping of intoxicating liquors, they might be considered as parts of one and the same tenement, and the illegal use of either, while thus connected and used, would be an illegal use of the tenement. *Held*, that the defendant had no ground of exception.

At the trial of an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence tending to show that there were two seizures of intoxicating liquors made during the time covered by the indictment; and that these liquors, at the time of seizure, were in places where they were not likely to be seen by persons visiting the premises. The judge declined to rule that if the liquors seized were not offered by exposing them to those who might become purchasers, and that if the liquors were deposited where their presence could not be known to the public, the jury could not find upon such state of facts alone an illegal keeping, although the defendant did keep and intend to sell them; and ruled that, if the liquors were kept in the tenement, and at the time to which the evidence related, for the purpose of being sold when occasion or opportunity offered, the defendant might be convicted. *Held*, that the defendant had no ground of exception.

INDICTMENT on the Gen. Sts. *c.* 87, §§ 6, 7, charging the defendant on May 1, 1878, and on divers other days between that day and the day of the finding of the indictment, September 9, 1878, with keeping and maintaining a certain tenement in Weymouth, used for the illegal sale and illegal keeping of intoxicating liquors, the same being a common nuisance.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared from evidence introduced by the government that, during a portion of the time from May 1, 1878, the defendant was in occupation of a building, using the second story as a dwelling, and the residue of the building for other purposes; that he also occupied and used one room in the first story, which was designated as the billiard room, and which contained a bar for business purposes, but there was no direct evidence of sales or seizures of intoxicating liquors there; that there was a room in the rear of the billiard room, which had two doors, one leading into the billiard room and one into the entry; that this room, during the first portion of the time covered by the indictment, was not used for business purposes, nor in any way, so far as the evidence disclosed; that some time in June or July, 1878, the bar and fixtures connected therewith were removed from the billiard room; and that, after such removal, the business was conducted with reference to the sale of liquors in the rear room exclusively.

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There was also evidence tending to show that two seizures of intoxicating liquors were made during the time covered by the indictment; and that these liquors were at the time of seizure in places where they were not likely to be seen by persons visiting the premises.

The defendant asked the judge to rule that the government must elect as to which tenement or room it would rely upon for a verdict; and that, if the billiard room was separately used for the illegal sale and illegal keeping for sale of intoxicating liquors, and at a subsequent portion of the time still another room was used separately for such business, the government must elect. But the judge refused so to rule; and instructed the jury that a tenement might consist of two rooms used together, and immediately connected with each other, and if the two were thus used alternately or interchangeably for the illegal sale or the illegal keeping of intoxicating liquors, they might be considered to be parts of one and the same tenement, and the illegal use of either, while thus connected and used, would be an illegal use of the tenement.

The defendant also asked the judge to rule that it was necessary for the government to show the illegal keeping for sale of intoxicating liquors; that if the liquors seized were not offered by exposing them to those who might become purchasers, and that if the liquors were deposited where their presence could not be known to the public, the jury could not find upon such state of facts alone an illegal keeping, although the defendant did keep and intend to sell them.

But the judge refused so to rule; and ruled that, if the intoxicating liquors were kept in the tenement, and at the time to which the evidence related, for the purpose of being sold when occasion or opportunity offered, the defendant might be convicted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The instructions given to the jury were appropriate and sufficient. *Exceptions overruled.*

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COMMONWEALTH *vs.* JAMES RONAN.

Norfolk. Nov. 25.—26, 1878. COLT & MORTON, JJ., absent.

At the trial, on appeal, of a complaint charging the defendant with keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the conviction of the defendant must be of the same offence of which he was convicted in the court below, but need not be upon the same evidence.

COMPLAINT to the District Court of East Norfolk, on the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining on January 1, 1878, and on divers other days between that day and July 22, 1878, a certain tenement in Weymouth, used for the illegal sale and illegal keeping of intoxicating liquors, the same being a common nuisance.

At the trial in the Superior Court, before *Brigham*, C. J., there was evidence tending to show that intoxicating liquor was kept and sold by the defendant, from January 1, 1878, to the middle of June, 1878, in one tenement, and from that time to July 22, 1878, in another tenement, which was separate and distinct from the first, and to which the defendant removed about the middle of June. The defendant contended that he could not be convicted; that the government must at least elect as to which tenement it would rely upon, if there could be an election; and that there could be no election, the offence being charged as a continuing offence; and asked the judge so to rule. But the judge ruled that the government could elect; and the government thereupon elected to rely upon evidence relating to the second tenement.

The only evidence introduced after this election related solely to the keeping of the second tenement. There was some evidence that testimony was given in the District Court as to the defendant's keeping the first tenement as well as the second; and that no witness there testified that the defendant removed from the first tenement by the middle of June, or occupied more than one tenement from January 1 to July 22.

The defendant asked the judge to rule as follows: "1. There can be no conviction on the complaint. 2. The defendant can only be tried and convicted in the Superior Court for the keeping of

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the same tenement for the keeping of which he was tried and convicted in the District Court. 3. The defendant can only be tried in the Superior Court for keeping that tenement which the complainant had in his mind when he made the complaint. 4. While the presumption is that the defendant is on trial for the same offence, the allegation in the complaint from January 1, 1878, to July 22, 1878, is competent evidence for the jury to consider in deciding whether the defendant was being tried for the same offence of which he was convicted in the District Court."

The judge refused so to rule; and instructed the jury as follows: "The defendant can be convicted of that offence only of which he was convicted upon the present complaint in the court below; but the presumption is, that, if the offence now proved and the offence described in the complaint correspond, the offence proved in this court and the offence of which the defendant was convicted in the court below are the same. The conviction of the defendant in the court below was of keeping a tenement during some part of the time between January 1 and July 22, 1878. If the evidence offered at this trial is of the same offence testified of on the trial of the defendant on this complaint in the court below, and more specifically applies to a tenement kept by the defendant from the middle of June to July 22, 1878, that fact tends to prove that the defendant's conviction in that court was of the offence of keeping that tenement." The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

By the Court. The defendant has no ground of exception to the proceedings and instructions at the trial. His conviction in both courts must be of the same offence, but need not be upon the same evidence. *Commonwealth* v. *Fields*, 119 Mass. 105. *Commonwealth* v. *Crawford*, 9 Gray, 129.

Exceptions overruled.

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COMMONWEALTH *vs.* BOSTON AND LOWELL RAILROAD CORPORATION.

Essex. Nov. 6, 12. — Dec. 9, 1878. ENDICOTT and LORD, JJ., absent.

The St. of 1874, *c.* 372, § 163, imposing a penalty where "by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," a life is lost, applies to a case where such a corporation is using a railroad track reasonably incident to the business in which the corporation is lawfully engaged, although the track is not within the chartered limits of the corporation, or of a road then under its control, but is a private track which it is using by the mere sufferance and license of its owner.

At the trial of an indictment, under the St. of 1874, *c.* 372, § 163, against a railroad corporation, for killing four persons not passengers, there was evidence that three of the persons had been on an excursion in a steamboat, which, on its return at night, stopped at a pier two thousand feet long, the outer part of which was one hundred feet wide, and the part towards the shore, for the distance of thirteen hundred feet, was twenty-six feet wide and built on piles; that there were two railroad tracks on the pier, the rail on the east side being so near a box, three feet high, covering a water-pipe on that side, that when a train of cars was on the east track there was only a space of from five to seven inches between the box and the cars; that the three persons were seen to leave the boat and to go with a crowd of persons towards the shore end of the pier; that they were again seen with the fourth person, who was the son of two of them and who had not been on the excursion, as a train of cars, which came upon the pier with great rapidity and without due warning, was rolling them round and round between the side of the cars and the box, and that their bodies were soon after found under the cars; that some persons escaped by getting on to the box, and one by hanging on the outside of the pier. *Held*, that there was sufficient evidence to warrant the jury in finding that all the persons killed were in the exercise of due care at the time of the accident.

INDICTMENT on the St. of 1874, *c.* 372, § 163, alleging, in separate counts, that on August 29, 1877, Joseph Swasey, Lydia A. Swasey, Wilbur B. Swasey and Rachel B. Gifford, not being passengers, while in the exercise of due diligence, were killed by the defendant corporation, through the gross negligence and carelessness of its servants and agents, while engaged in its business, upon the pier of the Philadelphia and Reading Coal and Iron Company, at Salem. At the trial in the Superior Court, before *Bacon*, J., the following facts appeared:

The pier where the accident happened was not within the location of any railroad corporation, but the tracks were laid by the Eastern Railroad Company, under a license from the Phila-

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delphia and Reading Coal and Iron Company. The pier extends from Derby Street, southerly into the harbor of Salem, about two thousand feet, of which about thirteen hundred feet, being the part towards Derby Street, is built upon piles, and about seven hundred feet in length of the southern end is solid, being built of stones and earth. The width of the part on piles is twenty-six feet, and the width of the filled part is one hundred and three feet. About two hundred feet from Derby Street, on the pier, is a gate, which is in two parts and opens against a water box on the east side of the pier, and against the rail on the western side; the eastern half of the gate is eleven feet three inches long. There are two tracks from Derby Street upon the pier: the eastern track has the rails even with the planking of the wharf, and the rails on the western track are laid upon the surface of the planking. The width of the pier, inside of the timbers on the side of it, is twenty-three feet five inches; on the eastern side of the pier is a box that covers a pipe that carries water from Derby Street, down to the head of the pier; this box is fourteen and one half inches wide, and one foot deep, and the top of it, at the gate, is three feet seven inches above the planking. The east rail on the east track is three feet and one inch from the timber under the box on the eastern side of the wharf. The width of the tracks is four feet eight and a half inches, and the distance between the two tracks seven feet, and, when there is a train of cars on each track, the distance between the two trains is about three feet. The distance from the side of the car to the water box is six and one half inches, and, at the gate, five and one quarter inches. There was a nut about three inches from the bottom of the car, on the side of the car that caused the accident, that extended out from the side of the car an inch and a half, and a staple about a foot long extended out from under the side of the car, from the bottom of the car, about two inches and a half from the side of the car. The car is nine feet seven inches wide. From the bottom of the car body to the planking the distance is three feet five inches, and from the lower step sixteen and one half inches to the planking.

On August 29, 1877, the steamer Plymouth Rock, for which an excursion had been arranged by her agent, sailed from the pier

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to the Isles of Shoals in the forenoon and returned to the pier at about seven o'clock in the evening of the same day. Tickets for the excursion were sold by the ticket-masters of the defendant at Lowell and Lawrence, and a special train was run which united cars from Lowell and Lawrence, and the same were taken in the morning, by the persons in charge of the train, upon the pier, and the passengers discharged. The engine and cars were manned by servants of the defendant corporation.

The Plymouth Rock took on the excursion from the head of the pier, in the morning, about twenty-five hundred passengers, and returned with the same number in the evening. There were only about five hundred and twenty of the passengers on the steamer that were passengers in the train, the rest of the passengers being from Salem and vicinity. The train that went to the pier to take the Lowell and Lawrence passengers consisted of twelve cars, and arrived at the pier soon after eight o'clock in the evening.

The government offered evidence tending to prove, and it was admitted to be true, that the conductors of the train, and such other persons as had charge and control of it, were the agents and servants of the defendant, engaged at the time in its business; and that this train was then engaged in the business of carrying passengers for hire, and the profits of such carrying were for the benefit of the defendant, and were received by it, although it received no additional recompense for the moving of the train on to the pier.

When the train stopped upon the pier in the evening, the engine and five cars and a part of the sixth car had passed the gate, and, when it stopped, Joseph Swasey was found on the east rail of the east track under the rear truck of the fifth car, dead, a few feet down the pier from the gate, and Rachel B. Gifford, Lydia A. Swasey and Wilbur B. Swasey were found at the gate and a few feet from the northern end of it. Mrs. Swasey was dead, and Wilbur B. Swasey and Rachel B. Gifford were still living. Rachel B. Gifford died the same night, and Wilbur B. Swasey died the next morning. The physicians, who were called to examine them soon after the accident, testified that these persons were all injured in the same manner, and that the injuries were such as would be caused by the rolling of their bodies

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between the car and the water box, and that the injuries were such as must cause death.

There was evidence tending to prove that this train of cars came upon the pier at about eight o'clock, at a speed of six miles an hour, without any light upon the engine which could be seen by the people in front of it; that the night was so dark that the train could not be seen by a person who was looking intently for it, and who, being upon the pier, was watching to see which track it was coming upon, until it was within fifteen feet of him; that no whistle was blown at any place at which the train could have been seen from the pier, in the day-time; that no bell was rung, and no lights were displayed upon or in the vicinity of the train, and no warning given in any manner of its approach. The defendant put in evidence contradicting the testimony in behalf of the Commonwealth on these points.

There was also evidence tending to prove that, in addition to the passengers arriving by the steamboat, a large number of persons came down upon the pier to see her arrive or to meet their friends; that during the whole time between the arrival of the steamer and the occurrence of the accident, there were large crowds of people upon the pier, and especially that the part of the pier between the solid part and the gate was so crowded with people as to impede locomotion; that a large number of those who were waiting for the train, in which to go to Lawrence and Lowell, were standing upon the pier; and that the switches upon the pier also interfered with the travel of passengers.

Joseph Swasey, Lydia A., his wife, and Rachel B. Gifford, a sister of Lydia A., went upon the excursion in the Plymouth Rock, lived in Salem, and were not passengers in the cars. They landed from the steamer Plymouth Rock among the last that landed, not more than two or three hundred landing after them. There was evidence that it took the passengers about an hour to get off the steamboat.

One witness testified that he saw Joseph Swasey, his wife and wife's sister, at the head of the coal pockets which are on the solid part of the pier; that they passed up the pier, and he remained a few minutes at the pockets after they passed up; that he did not remain longer than fifteen minutes, and then passed up the pier to Derby Street; that when going up the pier

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towards Derby Street he did not see Mr. and Mrs. Swasey or Miss Gifford; that when he got on to Derby Street, about three or four rods from the railroad track, he saw the train going across Derby Street towards the pier; and that, after going up to East Webb Street, and assisting two ladies to take the horse-cars, he stopped some five minutes, and returned to Derby Street, where he heard of the accident.

Another witness testified that he went upon the pier between seven and eight o'clock of the evening of the accident; that he went down the pier towards the steamboat, remained awhile, and then proceeded up the pier towards Derby Street; that when on the way up, and within a few feet of the engine, he saw it coming and jumped to the right and threw himself upon the water box some ten feet to the north of the gate; that when he got on to the water box he saw a young man standing some four feet to the south of him and between him and the gate; that he saw two women standing near the young man a little farther to the south; that he cried out to the young man to get upon the box; that the car took the young man and the women and rolled them round and round, and they fell between the car and the gate; that when the car stopped the four persons killed were under the cars.

There was also evidence that one person as the engine approached got over the side of the pier, and held on by the railing, and others, including one woman, got on the water box.

No other witness testified to seeing either of the persons killed prior to or at the time of the accident; but Wilbur B. Swasey, who did not go upon the excursion, was seen at a place in Salem about a mile distant from the pier at about six o'clock the same evening.

It appeared in evidence that the pier was constructed by the Philadelphia and Reading Coal and Iron Company, and was owned by it, for the purpose of landing coal to be delivered to the railroads with which the tracks upon it were connected, and that the consent of the agent of the Coal and Iron Company was obtained by the agent of the steamboat for the boat to land at the pier, and for the train to run upon the same, as a matter of mere accommodation and without compensation, and that the defendant corporation had no right to run upon the pier except

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by virtue of this license. There was no evidence that the directors, superintendent, or managers of the defendant corporation had any knowledge of the arrangement thus made, or of the use of the pier under such license.

The defendant asked the judge to rule that the defendant was not liable to an indictment under the St. of 1874, *c.* 372, § 163, where a death was caused upon a track not owned by or within the chartered limits of its road, nor within the chartered limits of any other railroad which was under its control, but was upon a private railroad track not constructed under any law of the Commonwealth, and upon which a train of cars belonging to the defendant was being drawn by the mere sufferance and license of the owner of said track, without any contract or compensation therefor, but simply by permission for this particular occasion; that the defendant would not be liable for the death of a person upon said track, if the only evidence of authority from the defendant to take its train upon the track was the fact that it was so taken by its conductors upon this occasion, for the accommodation of these excursion passengers, without any additional compensation to the defendant therefor, or any knowledge that the same was to be done by any other officer of the corporation.

The judge refused so to rule, but ruled that if a train, belonging to the defendant corporation and under the charge of its conductors, without any previous contract or direction therefor, and under the circumstances above described, was taken by the direction of the conductors upon the track for the accommodation of the persons carried and to be carried in said cars, although the corporation received no additional compensation for entering upon said track, the defendant would be liable under this statute for the killing of a person through the gross negligence and carelessness of its servants and agents.

At the close of the evidence, the defendant requested the judge to direct a verdict of not guilty, on the ground that there was no evidence tending to show that the persons killed, or either of them, were in the exercise of due diligence at the time of the accident. The judge declined so to do, and ruled that the question of due diligence was a question that should be submitted to the jury under all the circumstances of the case, and that the

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question whether these persons were walking upon the track or went upon the pier under a license express or implied from the owners of the wharf, together with the nature and extent of the license, was a question for the jury under all the circumstances of the case.

The jury returned a verdict of guilty on all the counts; and the defendant alleged exceptions.

J. H. George (of New Hampshire) *& C. P. Thompson*, (*J. G. Abbott* with them,) for the defendant.

S. B. Ives, Jr. & S. Lincoln, Jr., for the Commonwealth, were not called upon.

COLT, J. The defendant corporation sold passenger tickets at Lowell and Lawrence, for an excursion to Salem, and thence by steamer to the Isles of Shoals. The special train upon which these passengers were carried was owned by the defendant, and was managed and controlled by its agents and servants. For the convenience of the passengers, and by the directions of those in charge, the train was run on and along the pier and wharf of a coal company, upon which were railroad tracks for the private use of the company, connected by a switch with the Salem and Lowell Railroad. The agent of the steamboat had obtained verbal permission from the coal company to receive and land the passengers there, and for the train to use the tracks upon the pier down to the boat for that purpose. There was no evidence that this use of the pier by the train on this occasion was known to the superior officers of the defendant corporation, but it was admitted that the persons in charge of the train were at the time engaged in the business of the railroad company, namely, the business of carrying passengers for hire, the profits of which were received by the company, although no additional recompense was had for running upon the wharf. The persons whose lives were lost by the alleged negligence of the corporation, or the gross negligence of its servants, were passing on foot over the pier, and were killed by the defendant's train as it came down in the evening to receive the passengers leaving the steamer on its arrival at the wharf.

The defendant is indicted under the St. of 1874, *c.* 372, § 168, which provides a penalty in cases where "by reason of the negligence or carelessness of a railroad corporation, or of the unfit

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ness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger is lost; or the life of any person being in the exercise of due diligence, and not being a passenger, or in the employment of such corporation, is lost;" "provided that the corporation shall not be so liable for the loss of life by any person, while walking or being upon its road contrary to law."

The first question raised by the bill of exceptions is, whether the statute applies, when the loss of life occurs upon a railroad track not owned by the defendant, or within the chartered limits of its road, nor within the chartered limits of a road then under its control, but upon a private track upon which the train is run by the mere sufferance and license of the owner. It was ruled that, upon the facts admitted, the defendant might be liable under the statute for the killing of a person under such circumstances. This ruling was right. The defendant is liable if the death is caused by the gross negligence and carelessness of its servants, while engaged in its business. If the construction contended for by the defendant is the true construction, and the words "while engaged in its business" are held to limit the liability to cases of negligence arising directly in the business of transporting passengers and freight upon its own road, or upon a road which it lawfully uses, still the case comes fairly within its provisions. It is apparent that the use of this track was reasonably incident to the business in which the corporation was lawfully engaged. The track was constructed for the purpose of affording access from tide-water to the railroads terminating in Salem; and it makes no difference that it was a private track, built and owned by another corporation, instead of a track built, as it well might have been, under the chartered powers of the railroad corporation. There was evidence to warrant a finding that the act of running the train on this track by the verbal license of its owner was authorized by the defendant corporation. At the time of the accident the defendant was in the actual use and occupation of it by the consent of the owner, and it must be treated, so far as this liability is concerned, as the defendant's track. It is settled that railroad corporations may incur responsibility, and subject themselves to liabilities, as incident to their business, for acts occurring beyond the limits of their own line. *Feital* v.

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Middlesex Railroad, 109 Mass. 398. *McCluer* v. *Manchester & Lawrence Railroad*, 13 Gray, 124.

It is further insisted, that there was no evidence which would justify the jury in finding that the persons killed were in the exercise of due care and diligence at the time of the accident. The judge was requested so to rule, but ruled that the question of due diligence, and the question whether these persons were walking upon the track or were upon the pier, under a license express or implied from the owners of the wharf, as well as the nature and extent of the license, were questions for the jury, under all the circumstances of the case.

The burden is upon the Commonwealth to show that the persons killed were in the exercise of due care and diligence; but this burden is sustained by proving facts and circumstances from which it may be fairly inferred. If there is a sufficient disclosure of facts, the mere absence of fault may be sufficient. In the case at bar, the circumstances were such as tended to exclude the idea of fault, and to indicate that these persons were in the exercise of ordinary care. See *Crafts* v. *Boston*, 109 Mass. 519.

It appears that three of the persons killed were passengers upon the excursion steamer, and the jury may well have inferred that the other, who was not a passenger, was properly there, by implied license, to take care of and conduct his father and mother home. There was evidence tending to show, that they all proceeded together up the pier, with reasonable despatch, and with nothing appearing unusual or disorderly in their conduct; it was the only way to reach the street; the night was dark, and progress was impeded by crowds of other people passing along the passageway in which the tracks were laid, or standing on the pier waiting to take passage in the train. Of the twenty-five hundred passengers on the steamer, two thousand from Salem passed over these tracks from the wharf to the street, on their way home. For a distance of thirteen hundred feet, where the pier was built on piles, the width of the passageway, inside of the timbers placed on each side, was about twenty-three feet. Within this space two tracks were laid. The track on the east side was planked up even with the rails, to accommodate ordinary travel to and from the wharf, while the rails of the other track were laid on the surface of the planking. It was upon the east

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track that the accident happened. There was evidence that the train was running with great speed; that those who knew it was coming, and were watching for it, were unable to see it, until it had approached within fifteen feet. Many of the more active and less timid of those who saw it escaped the danger by throwing themselves over and hanging on by the side of the pier, or by springing to a perilous position, upon a box covering a water-pipe, that was constructed by its side. In all this there was some evidence that parties passing over that part of the passageway, which was apparently constructed for the use of those passing on foot to and from the wharf, and who were thus exposed to a sudden danger, from which escape was difficult, and who were there crushed between the train and the side of the pier, were in the exercise of ordinary care and diligence.

Those who, by express or implied license, were rightfully on the pier, were in a position similar to that of persons who, in a crowded station, pass along a way prepared for their use, and who have a right to rely on the usual and additional precautions which are taken by railroads to protect such persons from injury from an approaching train. A very different state of facts is thus presented from that upon which the case of *Hinckley* v. *Cape Cod Railroad*, 120 Mass. 257, was decided.

Exceptions overruled.

Sylvanus W. Burgess *vs.* Equitable Marine Insurance Company of Provincetown.

Plymouth. Oct. 19, 1875; March 2, 1876. — Dec. 23, 1878. Soule, J., absent.

A vessel was insured against perils of the seas "at and from Plymouth to Banks, cod-fishing, and at and thence back to Plymouth." The premium was to be at a certain rate per month, and the policy was to end with the voyage. The vessel sailed with the usual quantity of bait, but not with a full supply for the trip, it being customary to rely on catching live bait on the Banks. Such bait had been plenty in previous years, but this year was scarce; and the master, after exhausting the bait on hand, and being unable to catch any, went to the nearest practicable port for bait, returned to the fishing-grounds, and the vessel was afterwards lost by a peril insured against. *Held*, in the absence of evidence of a usage to put into port for bait, under such circumstances, that the doing so was a deviation which discharged the insurer.

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CONTRACT on a policy of insurance, dated June 20, 1874, against perils of the seas, whereby the defendant company insured, "lost or not lost, B. A. Hathaway, for Sylvanus W. Burgess, twenty-three hundred dollars, loss, if any, payable to Sylvanus W. Burgess, on Schooner Christie Johnstone; eight hundred dollars on great generals; three hundred and fifty dollars on small generals; three hundred and fifty dollars on advance to crew on board said schooner, at and from Plymouth to Banks, cod-fishing, and at and thence back to Plymouth; risk to com mence June 13, 1874, at noon." The rate of the premium was 3-4 per cent per month, the premium note given was for $114, and the vessel was valued at $2,500. The policy was indorsed "expires with voyage." Answer, a deviation.

Trial in this court before *Gray*, C. J., who reported the case for the consideration of the full court in substance as follows:

The plaintiff introduced evidence tending to show the following facts: The vessel sailed from Plymouth on June 13, 1874, on a cod-fishing voyage to the Banks, in a seaworthy condition, with four barrels of clam bait, which was the usual quantity of bait taken by vessels of her class on such a voyage. For several years past it has been the practice of such vessels not to take enough bait to last for the entire trip, but to rely principally on catching squid on the Banks, and to use them for bait; and for several years prior to 1874 squid have been plenty on the Banks, but in 1874 they were very scarce.

After fishing on the Banks for three weeks, and having exhausted nearly all his bait, the master of the vessel, solely for the purpose of procuring bait, went to St. Peter's, the nearest practicable port where bait could be obtained, there procured bait, and then sailed from St. Peter's to the Banks, and resumed fishing. To reach the port of St. Peter's, the vessel sailed about one hundred and ten miles from the fishing-ground. She left the fishing-ground on Thursday, reached St. Peter's on Saturday; and, having procured bait there, left St. Peter's on Tuesday following, and then sailed for another Bank, where she arrived and resumed her fishing on the next Thursday. On August 6, 1874, while so fishing on the Banks, the vessel encountered a severe gale, sprung a leak, and was totally lost, with all the property on board.

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The defendant requested the judge to rule, that these facts amounted in law to a deviation. The judge declined so to rule; but ruled as follows: "If the vessel left Plymouth with the usual amount of bait for the kind of fishing in which she was to engage, and, by an unexpected failure of bait of the kind ordinarily taken on the fishing-ground, it became necessary for her to go into port to procure bait, and she went to the nearest practicable port for that purpose, such going into port was not, as matter of law, a deviation."

The defendant consented to a verdict for the plaintiff, subject to the opinion of the full court upon the question, whether, as matter of law, there had been a deviation. If, in the opinion of the court, the going to St. Peter's for bait was a deviation which discharged the insurer, the verdict was to be set aside, and judgment entered for the defendant; otherwise, judgment for the plaintiff on the verdict.

The case was argued in October 1875, and reargued in March 1876.

J. C. Dodge, for the defendant. 1. The facts in this case amounted in law to a deviation which discharged the insurers. The description of the voyage in the policy is definite and determinate: "At and from Plymouth to Banks, cod-fishing, and at and thence back to Plymouth."

"If the vessel departs voluntarily, and without necessity, from the usual course of the voyage, the insurer is discharged." "The meaning of the contract of insurance for the voyage is, that the voyage shall be performed with all safe, convenient and practicable expedition, and in the regular and customary track." "The shortness of the time, or of the distance of a deviation, makes no difference as to its effect on the contract." 3 Kent Com. 312–314. 2 Arnould on Ins. (4th ed.) 416. *Elliot* v. *Wilson*, 4 Bro. P. C. (2d ed.) 470. *Middlewood* v. *Blakes*, 7 T. R. 162. *Brown* v. *Tayleur*, 4 A. & E. 241. *Maryland Ins. Co.* v. *Le Roy*, 7 Cranch, 26. *Kettell* v. *Wiggin*, 13 Mass. 68. *Dodge* v. *Essex Ins. Co.* 12 Gray, 65. *Fernandez* v. *Great Western Ins. Co.* 48 N. Y. 571. *United States* v. *The Paul Shearman*, Pet. C. C. 98. *Merchants' Ins. Co.* v. *Algeo*, 32 Penn. St. 330.

2. To create the necessity which justifies a departure from the course of the voyage, there must be a degree of force exercised

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towards the captain, which either physically he could not resist, or morally, as a good subject, he ought not to resist; as where there is force by mutiny of crew, or force by a national ship. Short of this actual constraint and force are the following: Making a port to refit, or to recruit the crew when generally disabled by sickness; stress of weather; endeavoring to avoid capture; to join convoy; to succor ships in distress; and this is confined to cases where human life is in peril, and does not extend to saving property. 2 Arnould on Ins. 465, 472. And it is only in such cases that a deviation is justified. *Folsom* v. *Merchants' Ins. Co.* 38 Maine, 414. *Robertson* v. *Columbian Ins. Co.* 8 Johns. 491. *Stevens* v. *Commercial Ins. Co.* 6 Duer, 594. *Parsons* v. *Manuf. Ins. Co.* 16 Gray, 468. *Stocker* v. *Harris*, 3 Mass. 409. *Duerhagen* v. *United States Ins. Co.* 2 S. & R. 309.

3. Where the departure from the course of the voyage is to subserve the exclusive interest of the party insured, the departure from the voyage is held to be a deviation. And it has been held in this state, that, if such departure is to avoid a peril of the sea not insured against, the insurer is discharged. *Breed* v. *Eaton*, 10 Mass. 21. See also *O'Reilly* v. *Royal Exchange Assur. Co.* 4 Camp. 246; 2 Parsons Marit. Law, 300, n. 1.

Whether this is the general rule of law or not, if the deviation were caused by peril, or to avoid a peril not insured against, such peril must be a peril of the sea, or a peril ordinarily insured against. 2 Arnould on Ins. 472. 3 Kent Com. 317. 1 Phil. Ins. §§ 1024 *et seq.* 2 Parsons Marit. Law, 300.

If a vessel insured to Havana and back should learn, before entering the port, that there was no cargo there with which she could be loaded, no one would say that her policy protected her in going to the nearest port where a cargo could be had. The defendant did not undertake either that bait should be found on the Banks, or that the voyage should be successful, but only that the vessel should be safe from the perils of the sea, on the voyage stated in the policy.

The case of *The Tarquin*, 2 Lowell, 358, not being a case of insurance, has no application to the case at bar.

J. Lathrop & A. Mason, for the plaintiff. 1. The insurance was not on a voyage between two fixed termini, and the policy is

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not to be construed by the rules of law applicable to such a policy. The nature of the adventure is described generally as "at and from Plymouth to Banks, cod-fishing, and at and thence back to Plymouth." That "voyage," in such a policy, does not mean "route," but does mean "enterprise," is settled by the case of *Friend* v. *Gloucester Ins. Co.* 113 Mass. 326. The rules governing route policies are therefore no more applicable to an enterprise policy than to a time policy. The policy in this case is more like a time policy than a route policy; for to speak of the vast region of shoals, known as the Banks, as a terminus, would be equivalent to saying that the vessel could not leave the first place on the Banks at which she arrived, without avoiding the policy. The premium in this case was fixed at a certain rate per month, and the policy was indorsed, "expires with voyage." The vessel might, therefore, stay out an indefinite time, while engaged in the prosecution of her enterprise. See *Matheson* v. *Equitable Ins. Co.* 118 Mass. 209; *African Merchants* v. *British Ins. Co.* L. R. 8 Ex. 154. In *The Tarquin*, 2 Lowell, 358, Judge Lowell held that the putting into St. Peter's, under similar circumstances to those in the case at bar, was not a deviation as between the owners of the vessel and a seaman who had shipped on a voyage from Provincetown to the Banquereau Banks and back. The defendant contends that this case has no application, because it was not a contract of insurance. But a deviation, unless justified by necessity, is a breach of the contract, whether it be of wages, affreightment, or of insurance. The rule is the same, and there are the same exceptions to it, in all these instances.

2. In the absence of evidence of any usage to the contrary, it must be presumed that the going into St. Peter's was customary, under similar circumstances. The plaintiff, having obtained a ruling in his favor, had no occasion to go into the question of usage, but it was open to the defendant to show that the usage was the other way. As he did not do so, it may be assumed that what was done was not against usage; and the contrary cannot be assumed.

3. If the master had had on board, when he sailed, all the bait that was required for the voyage, he would clearly have had the right, if, through no fault of his, this bait had become lost or

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worthless, to have gone into the nearest practicable port for bait. The giving out of supplies is always a justification of a deviation. What difference can it make, then, that, instead of the bait giving out, he failed to find bait where he had reasonable grounds for the expectation that he would find it?

4. If it is necessary to show that a departure from the course of a voyage is for the benefit of all parties, the court cannot say, as matter of law, that the going into St. Peter's was not as much for the benefit of the insurer as of the insured. A vessel on a fishing voyage is exposed to perils of the seas, and it is clearly for the interests of the underwriter that the enterprise should be prosecuted with all reasonable despatch, and the vessel return home. It is not for his interest that the adventure should be indefinitely prolonged; nor is it for his interest that it should be too soon ended, where, as in this case, the amount of the premium is at a certain rate per month. The vessel sailed in June, and it was expected she would remain out three months, and a nominal premium was inserted in the policy, with a provision that it should be at a certain rate per month. If the master had not gone into port for bait, he must have either remained on the Banks an indefinite time, or have prematurely ended his voyage. In the one case, he might have remained out into the stormy season, and the risk would have been much increased. On the other hand, by prematurely returning, the underwriter would have earned a less premium than he had a right to expect.

5. If a deviation is from necessity or just cause, the underwriter is liable, and, in determining what is necessary, regard must be had to the nature of the voyage, especially if this is stated in the policy. A contract of insurance on a vessel is not merely an insurance of the vessel, nor is it an insurance on the voyage, but it is an insurance of the vessel for the voyage. Therefore, if by a peril to the ship the voyage is lost, the insured may abandon, although there is not a constructive total loss of the ship itself, without regard to the voyage. *Greene* v. *Pacific Ins. Co.* 9 Allen, 217, 224. Hence it follows, that, if an emergency renders it necessary to depart from the route in order to prevent a loss of the voyage, there is no deviation. Unreasonable delay in port after an insurance is effected on a ship "at and from" a place is undoubtedly a deviation, but, in considering

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what is unreasonable, regard must be had to the nature of the voyage, and the ship is covered while preparing for the voyage, and taking in cargo. *Chitty* v. *Selwyn*, 2 Atk. 359. *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383. *Gilfert* v. *Hallet*, 2 Johns. Cas. 296. 2 Arnould on Ins. (4th ed.) 455. *Phillips* v. *Irving*, 7 Man. & Gr. 325. So, if permission is given to touch at certain places intermediate between the termini, this is held to mean in connection with the purposes of the voyage. *Hammond* v. *Reid*, 4 B. & Ald. 72. *Langhorn* v. *Alnutt*, 4 Taunt. 511, 519. *Solly* v. *Whitmore*, 5 B. & Ald. 44.

6. The true rule is simply that, without regard to the question of benefit to the insurer, a departure from the course of the voyage from "necessity or just cause," is not a deviation. Weskett on Ins. (ed. 1781,) 168. Millar on Ins. 405. Park on Ins. (8th ed.) 619, 647. 2 Arnould on Ins. 464. Marsh. Ins. (5th ed.) 157. 3 Kent Com. 316. 1 Phil. Ins. § 977. The word "necessity" means in commercial law what is "reasonably fit and proper," under all the circumstances of the case. *Somes* v. *Sugrue*, 4 C. & P. 276. *The Amelie*, 6 Wall. 18. *The Fortitude*, 3 Sumner, 228, 248. *Gordon* v. *Mass. Ins. Co.* 2 Pick. 249. *Bliss* v. *Ropes*, 9 Allen, 339, 341, 343. The necessity in this case has been found by the jury.

In many cases a departure from the course of the voyage has been held to be justifiable where it was not in the least for the benefit of the insurer, but merely for the benefit of other interests. Thus in *Dunlop* v. *Allan*, Millar on Ins. 414, a departure was held not to be a deviation, although the plaintiff's goods could have been carried to and delivered at the port of destination, and the departure was made to avoid seizure of the ship and the rest of the cargo. And a departure to avoid a peril not insured against is not a deviation. *Scott* v. *Thompson*, 1 N. R. 181. *Green* v. *Elmslie*, Peake, 212. *Robinson* v. *Mar. Ins. Co.* 2 Johns. 89. See also *Driscol* v. *Passmore*, 1 B. & P. 200; *Driscol* v. *Bovil*, 1 B. & P. 313; *Stocker* v. *Harris*, 3 Mass. 409; *Clark* v. *United Ins. Co.* 7 Mass. 366; *Coolidge* v. *Gray*, 8 Mass. 526; *Riggin* v. *Patapsco Ins. Co.* 7 Har. & J. 279; *Pourverin* v. *La. State Ins. Co.* 4 Rob. (La.) 234; *Thomas* v. *Royal Exchange Assurance*, 1 Price, 195; *Perkins* v. *Augusta Ins. Co.* 10 Gray, 312; *The Teutonia*, L. R. 4 P. C. 171, 179.

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The only support for the defendant's position, that, unless the underwriter is benefited by the departure from the course, it is a deviation, is found in the unsuccessful argument of counsel in *Scott* v. *Thompson*, *ubi supra*, and in the dissenting opinion in *Robinson* v. *Mar. Ins. Co.*, *ubi supra*. Where a departure from the course is made to avoid a peril not insured against, it certainly cannot make any difference that the peril is one ordinarily insured against, for the underwriter cannot be bound by what others deem perils; especially when he has expressly contracted that he would not be bound for such perils. He must be held, if at all, on the ground of the necessity for the deviation; and to say that he is bound because such a peril is ordinarily insured against is illogical, and is confounding an illustration of the rule with the rule itself.

The illustration put by the counsel for the defendant, of a vessel insured to Havana and back, has no application to the case at bar, for, in the case supposed, nothing is said in the policy in regard to the nature of the enterprise; and it is not contended that the vessel could fish elsewhere than on the Banks; but merely that, in the absence of evidence of a usage to the contrary, she could do what was reasonably necessary to procure bait in the emergency that had occurred.

ENDICOTT, J.. By the terms of the policy the vessel was insured "at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth." This is a definite and distinct description of the contemplated voyage between two fixed termini. The Banks are named as the outward terminus, and while there engaged in cod-fishing, and until her return to Plymouth, the vessel was covered by the policy. The language used is not open to the construction that it was the intention of the parties to insure her while prosecuting the adventure elsewhere, or doing what was necessary to make it successful outside and beyond the prescribed limits. A voyage is the sailing of a vessel from one port or place to another port or place, and the purpose for which it is to be conducted, whether as a trading, freighting or fishing voyage, is often mentioned in policies of insurance. But this designation cannot vary or extend the description, route or termini of the voyage, as named in the policy, unless some usage. connected with the particular trade or adventure, is shown

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to exist. No evidence was offered of a usage in such voyages to leave the Banks and go into port for bait. So far as the evidence reported discloses any usage in that regard, it appears that for some years it had been the practice to carry out a limited amount of bait, and to rely upon obtaining an additional supply on the Banks. Such being the practice to obtain bait on the Banks, when the supply taken out was exhausted, a departure from the Banks for that purpose could not have been contemplated by the parties in making the policy. We have, therefore, a definite description of the voyage in the policy, and a usage that does not extend its provisions. The question decided in *Friend* v. *Gloucester Ins. Co.* 113 Mass. 326, arose upon a clause in a policy prohibiting a fishing vessel from sailing on a voyage east of Cape Sable after a certain date, and throws no light upon the construction to be given to the words of this policy. The decision in *The Tarquin*, 2 Lowell, 358, turned upon the construction of the shipping articles of seamen, and not of a policy of insurance.

We are, therefore, of opinion, that the vessel, by leaving the Banks and going to St. Peter's for bait, departed from the voyage described in the policy, and the only question to be determined is, whether in law there has been a deviation which avoids the policy.

It may be stated, in general terms, that the assured is protected by his policy, while the vessel pursues the usual and customary course of the voyage; but any departure from the course, or delay in prosecuting it, without necessity or just cause, is a deviation, and discharges the insurer, because another voyage has been voluntarily substituted for that which was insured. Whether the degree or period of the risk is increased, is unimportant, as the assured has no right to substitute a different risk. Whenever, therefore, there is a manifest departure from the course of the voyage, the assured must show that it was justified by the necessity of the case. *Stocker* v. *Harris*, 3 Mass. 409, 418. *Brazier* v. *Clap*, 5 Mass. 1. *Coffin* v. *Newburyport Ins. Co.* 9 Mass. 436, 449. *Kettell* v. *Wiggin*, 13 Mass. 68.

In the case at bar, the alleged necessity arose from scarcity of bait. The plaintiff did not put on board, when the vessel sailed from Plymouth, enough for the entire trip. Squid had been

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plenty on the Banks during several years prior to 1874, and the plaintiff relied upon catching them there and using them for that purpose. They happened this season to be very scarce, and, after fishing three weeks, and nearly exhausting his supply, the master sailed for St. Peter's, over one hundred miles distant, procured bait, and returned to the Banks after an absence of a week. It is to be observed, that this so-called necessity did not arise from any peril insured against in the policy, or ordinarily insured against in policies of insurance, and did not involve the safety of the vessel, or of any property on board; it had relation solely to the success of the fishing adventure; and in this the defendant had no interest and had assumed no responsibility.

We are of opinion that the claim of the plaintiff cannot be sustained; and that a necessity to justify the departure in this case cannot be found in the fact that, without going to St. Peter's for bait, the voyage would have failed to be successful or profitable to the plaintiff.

The strictness with which the courts have held the insured to the route named in the policy, is illustrated by the cases already cited, and by many others cited at the argument. *Dodge* v. *Essex Ins. Co.* 12 Gray, 65. *Middlewood* v. *Blakes*, 7 T. R. 162. *Brown* v. *Tayleur*, 4 A. & E. 241. *Fernandez* v. *Great Western Ins. Co.* 48 N. Y. 571. *Merchants' Ins. Co.* v. *Algeo*, 32 Penn. St. 330. But the question to be determined here is, what is the nature and extent of the necessity or just cause which will warrant a departure from the route.

In this connection it may be well to refer to the necessities which clearly justify a departure. There is no deviation when the master is compelled by force, either to depart from his route, or delay its prosecution by the acts of his crew; *Elton* v. *Brogden*, 2 Str. 1264; *Driscol* v. *Passmore*, 1 B. & P. 200; *Driscol* v. *Bovil*, 1 B. & P. 313; or where he is detained by those in authority, or taken out of his course by a ship of war. *Scott* v. *Thompson*, 1 N. R. 181. In *Phelps* v. *Auldjo*, 2 Camp. 350, a master was ordered to sail out and examine a vessel in the offing, by a captain of a king's ship, and, it appearing that he complied without remonstrance or threat of force, it was held to be a deviation. In cases of this description there must be a *vis major*, compelling a departure or delay, which excuses the master. So

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where the master is obliged to leave his course, or delay by stress of weather or other peril of the sea, or to go into port to repair or refit, or to re-man or recruit his crew disabled by sickness or reduced by casualties, or to avoid capture or to join convoy in time of war, there is no deviation. It is unnecessary to cite all the cases which fall within these exceptions; many of those relied on by the plaintiff are clearly within them. *Dunlop* v. *Allan*, Millar on Ins. 414. *Green* v. *Elmslie*, Peake, 212. *Clark* v. *United Ins. Co.* 7 Mass. 365. The case last cited is put upon the express ground that the ship was prevented by causes insured against from proceeding on her route, and the departure was from necessity. See also *Folsom* v. *Merchants' Ins. Co.* 38 Maine, 414.

Nor is the departure from the route for the purpose of saving human life a deviation; nor is a policy avoided when the ship goes out of her course to obtain necessary medical assistance for those lawfully on board. *Bond* v. *Brig Cora*, 2 Wash. C. C. 80. *Perkins* v. *Augusta Ins. Co.* 10 Gray, 312. In this class of cases the justification does not rest on the same ground as in those previously noticed. It is allowed from motives of humanity, and cannot be extended to the saving or protection of property. In all other cases the necessity must be a real and imperative necessity affecting the vessel, such as actual force preventing the master from exercising his will, peril of the sea, danger of capture, want of repair, disability of the crew, or unseaworthiness, occurring under such circumstances that the master, acting upon his best judgment for the interest of all parties, has no alternative, and is forced to leave his route, or delay its prosecution.

When the departure is caused by such a necessity, the change of route in no respect alters the insurance; because the course of a sea voyage must at times be necessarily subject to extraordinary perils of the sea, and contingencies beyond the control of the master, and in the presence of which he is forced to succumb; and when they occur, and he is obliged to depart from the usual course of the voyage, there is no deviation in the legal sense of the term, for the departure is the necessary incident of the route named in the policy, as prosecuted at the time by the ship. The probability of such occurrences is well understood;

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they are known perils of the voyage, and enter into the ordinary contract of marine insurance. And when the master, compelled by the necessity, does that which is for the benefit of all concerned, the act is within the intention of the policy, as much as if expressed in terms. It would be practically impossible to state in the policy all the perils which might arise in a sea voyage and excuse departure from the route; and therefore, by the rules of interpretation applicable to this species of contract, the policy is held by implication to include them. See *Greene* v. *Pacific Ins. Co.* 9 Allen, 217, 219. In such a policy as this, the necessities justifying a departure, in the absence of usage, from the route, and a visit to a port not named, are those which are caused by some peril occurring in the prosecution of the voyage within the limits named in the policy, and not those which arise in the prosecution of the business for which the voyage was undertaken.

It is true, there is a class of cases much relied on by the plaintiff, where the test is whether the ship at the time of the alleged deviation was pursuing the object and business of the voyage. But those are cases of delay, where the ship was at the port or place named or permitted in the policy. The permission in a policy to go to certain ports or places must always be construed in reference to the purpose of the voyage. *Williams* v. *Shee*, 3 Camp. 469. 1 Arnould on Ins. §§ 141, 142. Any delay for the prosecution of other business, or any unreasonable delay in prosecuting the business of the voyage at such port is a deviation. *African Merchants* v. *British Ins. Co.* L. R. 8 Ex. 154. But if the delay was necessary in order to accomplish the objects of the voyage, and was reasonable under the circumstances of the case, then there is no deviation. *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 388. *Phillips* v. *Irving*, 7 Man. & Gr. 325. In other words, if the ship is at a place permitted, the delay shall not be a deviation, if it is necessary in the proper prosecution of the business of the voyage. But this test cannot be applied to a departure from the route to a port not named or permitted, for the purpose of the adventure. In all trading voyages, for example, the ship is confined to the ports or coasts named in the policy, and she cannot depart to other places, simply because she may better prosecute the trade elsewhere. If

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the departure from the route to insure the success of the adventure can be justified as a necessity, it would be difficult to state any limit to the privilege, or to the duration of the insurance, and, in the absence of permission to do so in the policy, it cannot be implied. See *Kettell* v. *Wiggin*, 13 Mass. 68; *Robertson* v. *Columbian Ins. Co.* 8 Johns. 491. The plaintiff's vessel might have delayed for any reasonable time upon the Banks for the purpose of fishing or getting bait, without being guilty of deviation; and would have been protected by the policy, even without proof of usage, because fishing was the purpose of the voyage, and she could properly prosecute it within the route named in the policy. *Noble* v. *Kennoway*, 2 Doug. 510, 513. But she could not go beyond or away from the route for that purpose.

The illustration put by the defendant's counsel is apposite: "If a vessel insured to Havana and back should learn, before entering the port, that there was no cargo there with which she could be loaded, no one would say that her policy protected her in going to the nearest port where a cargo could be had." Other illustrations may be given. If a vessel insured to a particular port, having letters of credit, should find on arrival that the parties on whom they were drawn had failed, she could not go to another port for funds, and return for her cargo, and be protected by her policy. If fish had been scarce on the Banks in 1874, it would hardly be contended that the vessel could have gone to other fishing-grounds to fish, although not more distant than St. Peter's, and yet, if she was justified by necessity in leaving to obtain bait at St. Peter's and to return in order to make the trip successful, it would be difficult to hold that the same necessity would not allow her to fish elsewhere.

In the argument of the plaintiff's counsel, no case was cited which sustains the position he has assumed, and we are not aware of any case which goes to this extent. In *Greene* v. *Pacific Ins. Co.* 9 Allen, 217, the voyage was broken up by reason of perils to the ship insured against in the policy, and the question was as to the right to abandon. In *Stocker* v. *Harris*, 3 Mass. 409, which is strongly relied on by the plaintiff, an American ship sailing under Spanish colors, as allowed by the policy, delayed at Vera Cruz five months for the purpose of

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recovering outward cargo, which had been seized after landing by the authorities. The captain failed to obtain a restitution, and, being unable to obtain a clearance from Vera Cruz to the United States under Spanish colors, without giving bond to land his cargo in some part of the dominion of Spain, and there being a partner of a Spanish house in Havana by whose assistance he could restore the character of his ship as an American bottom, he took a cargo and freight and sailed for Havana. It is stated in the opinion, though not necessary to the decision, that the delay at Vera Cruz was not a deviation. And it was said by the court: "It may be understood that the insurers, by this policy," (which was on ship, cargo and freight,) "were not interested in the outward cargo, after it had been safely landed from the ship. But the captain is the common agent of the concerned, and it is his duty to manage their distinct and separate, as well as their joint interests, according to his best judgment; and whatever is fairly done with this purpose is within the course of the voyage." This is simply stating, in another form of words, that the object for which the ship was at Vera Cruz was the disposal of her cargo, and if the delay was occasioned by fairly attempting to do so, there was no deviation. But the case was decided for the defendant, on the ground that, in sailing for Havana, instead of to a port in the United States, as required by the policy, the ship deviated, and that the reason for doing so was not such a necessity as justified the departure. It was suggested, in giving the reasons for this decision, that if the partner had died, or had left Havana before the ship arrived, then by force of the same necessity a voyage to some other Spanish port or ports would have been equally excused; and thus the ship might have made several passages, although by the terms of the policy she was only insured from Vera Cruz to the United States; and that this would have been to engage the insurer in an unlimited voyage and risk. The same suggestion would be applicable in this case. If the master had failed to find bait at St. Peter's, the same necessity would have justified him in visiting port after port until he found it.

As in the opinion of the court the trip to St. Peter's was a deviation which discharged the insurer, by the terms of the report "there must be *Judgment for the defendant.*

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Ellen Jones *vs.* Granite Mills.

Suffolk. Jan. 3, 1877 ; Jan. 4. — Dec. 24, 1878.

In an action by an employee against a manufacturing corporation, for personal injuries received while endeavoring to escape from its mill, which was on fire, it appeared that the fire was caused by the heating of a bearing in one of the machines used in the mill, and that it might have been readily extinguished when first discovered; that the defendant had a cistern, with pipes leading to each story of the mill, to which were attached lines of hose, but at the time of the fire the water did not run when attempted to be used. *Held*, in the absence of evidence of any reason why the water did not run, that it must be attributed to the negligence of the fellow-servants of the plaintiff in failing to keep the apparatus in order, or in failing to put it in operation; and that the defendant was not liable.

If a manufacturing corporation has a mill properly constructed for its ordinary business, it is not, in the absence of a statutory requirement, responsible to an employee for not providing a means of escape from a fire, which is not caused by the negligence of the corporation.

Tort for personal injuries received by the plaintiff, while in the employ of the defendant, a manufacturing corporation, from the burning of its mill.

At the trial in this court, before *Lord*, J., the plaintiff offered to prove that the mill was a large building, five stories in height, with an attic; that each story contained one large room; that the only way of entrance to the several stories was through a tower on the outside of the mill, with stairs leading from story to story and coming to the platform at each story, and sufficient at all ordinary times to allow the operatives a passageway in and out; that this tower went up to the edge of the roof, to the sixth story; that on each side of this tower were fire escapes coming up from the ground to the fifth story, and there stopping, leaving the sixth story without any means of escape save by going down the tower or jumping from the gable windows of the room; that the plaintiff, a woman between twenty and thirty years old, had been at work at the mill about two years, in the upper room, spinning cotton; that the spinning rooms are inflammable, dangerous, and require constant care and watching to prevent fire; that about seven o'clock in the morning of September 19, 1874, a fire broke out in the fourth story, caused by the heating of a bearing in one of the mules, which, when first seen, was about the size of the flame of a candle; that it was first discovered by

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a man not in charge of that mule, who, on seeing it, ran to the end of the room, where there was a hose coiled up and hung upon a hook, having a nozzle to it and means for stopping and starting the water; that he uncoiled the hose, and turned the valve in the pipe leading from a cistern in the top of the building, from which another pipe led to each story, and ran with the hose toward the fire; that when he got near the fire, he opened the stop-cock on the hose-pipe to let the water come out, but none came; that he then dropped it and ran to the sink at the end of the room, and got a vessel of water and ran and threw it on the fire, but that did no good, the fire having got too much headway by that time; that no alarm up to that time had been made; but the alarm became general in that room, and the occupants all ran down out of the building; that in the fifth story the work was still going on, and the alarm was first given there by the fire drawing up the tower and the smoke coming into that room; that when the smoke rushed up into the sixth story the fire had so far progressed that escape by the tower was deemed impossible; that some tried it, but died, and some escaped by jumping; that the plaintiff, after trying the tower, ran back to the end of the room, and taking hold of a warp of yarn let herself down as far as she could, and then dropped the rest of the way, causing the injuries in question; that about twenty persons were either burnt or killed in jumping, and a great many wounded; that the hose and the apparatus for water were apparently, and to all outward appearances, in good order, and they had been, not frequently, but occasionally during the summer, tried to see if they were in order.

The plaintiff contended that it was the duty of the defendant to keep the apparatus for extinguishing fires in good order, to make safe and convenient ways of egress in case of fire in such a building, and to provide buckets with water in the rooms.

The judge thereupon reserved the case for the consideration of the full court. If a verdict for the plaintiff could be sustained on this offer of proof, with such inferences as the jury could legally draw, the case was to stand for trial; otherwise, the plaintiff to become nonsuit.

The case was argued in January 1877, and reargued in January 1878.

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B. F. Butler, (*E. L. Barney* with him,) for the plaintiff. An employer is under an implied contract or warranty to his employees to use due care to adopt and maintain in fit condition suitable instruments, means, and appliances with which the services required are to be performed, and a suitable place in which such services can be performed in safety, the employee, on his part, exercising due care. *Cayzer* v. *Taylor*, 10 Gray, 274. *Snow* v. *Housatonic Railroad*, 8 Allen, 441. *Gilman* v. *Eastern Railroad*, 10 Allen, 233, and 13 Allen, 433. *Coombs* v. *New Bedford Cordage Co.* 102 Mass. 572. *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282. *Ford* v. *Fitchburg Railroad*, 110 Mass. 240. *Arkerson* v. *Dennison*, 117 Mass. 407. *Hill* v. *Winsor*, 118 Mass. 251. *Sullivan* v. *India Manuf. Co.* 118 Mass. 396. *O'Connor* v. *Adams*, 120 Mass. 427. *Kelly* v. *Norcross*, 121 Mass. 508.

In the present case, can the court say, as matter of law, that the defendant has used "all reasonable precautions for the safety" of the plaintiff, when, the first time an emergency requires the use of the appliances for extinguishing fire, they fail? The fact that they fail is *prima facie* evidence that they were insufficient.

The case should have been submitted to the jury, to find whether the place where the plaintiff was put to work, with the means of escape as they existed, was a proper and safe one, such as persons in like business, of ordinary prudence and foresight, would or ought to provide for their servants to work in.

By her implied contract, the plaintiff undertook to attend to a machine; while the defendant undertook to provide a safe building and safe appliances. Her attention, time and skill were to be applied to her duty in no greater ratio than the defendant's attention, time and skill were to be applied to its duty.

It was for the jury to say, whether it was or not the defendant's duty to see that buckets were placed in the room and kept full of water; that the hose and water-pipes, apparently ready for use, had water in them, and would answer when they were called upon, and whose fault it was that they were not in proper order, and that there was no water in them. It was sufficient for the plaintiff to show that they were not in order. It was for the defendant to show why the appliances were not in order, and

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fit for the use to which they were intended. The defendant had held out to the plaintiff, when they hired her, that they had sufficient hose properly placed for the extinguishment of fire, and properly supplied with water. When the moment came, her means of escape were cut off, these appliances were out of order and useless, and their uselessness was, upon the facts stated, the proximate cause of the injury.

E. R. Hoar, for the defendant.

ENDICOTT, J. In examining the questions presented in this case, it is important to ascertain the specific acts of negligence on the part of the defendant, relied on by the plaintiff in her offer of proof.

No question is made but that the defendant's mill was strong and well built, safe and convenient for the usual and customary work carried on within it. It had a single staircase, placed within a tower, affording means of communication between the different stories, and of entering and leaving all parts of the mill, which was ample and sufficient under all ordinary circumstances, taking into view the character of the business and the number of persons employed. Nor is it contended that the fire originated or was occasioned by the negligence of the defendant. It was caused by the heating of a mule bearing. All attempts to check it proved ineffectual. It spread rapidly; the tower filled with smoke and flame, so that escape by the staircase was impossible. There were no other means of exit, and the plaintiff, to avoid the danger, attempted to escape by a window, and fell to the ground, suffering severe injury.

The negligence imputed to the defendant is twofold; first, that no proper and sufficient means of extinguishing fire, if it should occur, were provided; and, second, that there were no sufficient means of escape in case of fire.

If the fire had occurred by the negligence of the defendant, a liability might have arisen, on the ground that a person injured while attempting to escape a danger caused by the negligent act of another may maintain an action for the injury. And it may be that, when fire is a casualty peculiarly incident to, and reasonably to be anticipated in, the prosecution of a particular business, the employer is bound to take proper precautions against its occurrence. It may also be his duty to have proper means and

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appliances at hand to check it speedily when it does occur, on the ground that his failure to do so may bear upon the question whether he is responsible for the fire itself; and it might in some cases be difficult to draw the line between the precautions necessary to prevent its occurrence and those necessary to check it in the outset. But we are not called on to decide these points, for they do not necessarily arise in this case. For, even if we assume that such obligations rest upon the employer, no evidence was offered tending to show that the defendant failed to take proper precautions to prevent fire, or that the hose, tanks, and other appliances for extinguishing it were not all that under any circumstances would be required. The evidence offered was simply that the water did not run, when the fellow-servants of the plaintiff attempted to use it. This was not sufficient proof of negligence to charge the defendant. The defendant, in any aspect of the case, had done its whole duty when it supplied the proper appliances, the care and use of which must be necessarily entrusted to its servants. The failure of the water to run must therefore be attributed to the negligence of fellow-servants, either in failing to keep the apparatus in proper order or in negligently putting it in operation. *Cooper* v. *Hamilton Manuf. Co.* 14 Allen, 193. *Kendall* v. *Boston*, 118 Mass. 234. *Joy* v. *Winnisimmet Co.* 114 Mass. 63. *King* v. *Boston & Worcester Railroad*, 9 Cush. 112. *Allen* v. *New Gas Co.* 1 Ex. D. 251.

In either aspect of the question, the defendant is not liable. If the fire was not a casualty peculiarly incident to the business, and reasonably to be anticipated, then no obligation rested upon the defendant to guard against it in any way; if it was so incident to the business, the defendant having taken all proper precautions, and supplied all requisite appliances, which failed to work in the emergency through no fault on its part, then there is no liability to the plaintiff.

The other question is of a somewhat different character, for it cannot be said that failure to construct proper and additional means of exit from a mill in case of fire in any way contributed to the occurrence of the fire itself. All that can be said is, that, if they had been provided, some of the results that followed from the fire might have been lessened, alleviated, or prevented. And the narrow question is presented, whether a master is required

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by the common law so to construct the mill, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible. We know of no principle of law by which a person is liable in an action of tort for mere nonfeasance by reason of his neglect to provide means to obviate or ameliorate the consequences of the act of God, or mere accident, or the negligence or misconduct of one for whose acts towards the party suffering he is not responsible. If such a liability could exist, it would be difficult, if not impossible, to fix any limit to it. And we are therefore of opinion, that it is no part of the duty of a master to his servant, employed in a building properly constructed for the ordinary business carried on within it, in the absence of a statute requirement, to provide means of escape from it, or to have remedial agencies at hand to alleviate the results, or to insure the safety of the servant from the consequence of a casualty, to which his negligence does not directly contribute. The common law gives a remedy to a servant who is injured by the wrongful or negligent act of the master; the liability arises upon the doing of the act. But the common law goes no further; it does not provide a remedy when the master is not responsible for the act, on the ground that he has omitted to provide means to avoid its consequences. The master is not liable to the servant unless he has been negligent in something which he has contracted or undertaken with his servants to do, and he has not undertaken to protect him from the results of casualties not caused by him or beyond his control. See *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326.

It is no part of the contract of employment between master and servant so to construct the building or place where the servants work, that all can escape in case of fire with safety, notwithstanding the panic and confusion attending such a catastrophe. No case has been cited where an employer has been held responsible for not providing such means of escape. The construction and arrangement of manufactories and places where large numbers of persons are employed may be proper subjects of legislative action, and such an act has been passed since this catastrophe. St. 1877, *c.* 214.

We are of opinion that a verdict for the plaintiff on these facts could not be sustained; and, by the terms of the report, the entry must be *Plaintiff nonsuit.*

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WILLIAM H. KEITH, administrator, *vs.* GRANITE MILLS.

Bristol. Jan. 3, 1877; Jan. 4. — Dec. 24, 1878.

In an action by an employee, between twenty and twenty-one years of age, against a manufacturing corporation, for personal injuries received while endeavoring to escape from its mill, which was on fire, the plaintiff requested the judge to instruct the jury that it was the duty of the defendant to provide proper and suitable means of extinguishing fire, proper and suitable ways and means of escape, and of giving alarm to its servants in case of fire. The judge instructed the jury, that if the room in which the plaintiff was at work was a suitable place, and there were proper and suitable means of extinguishing fire, and the means of egress and escape were suitable and proper, and in order and ready for use, the plaintiff could not recover. *Held*, that the instructions as applied to the first and second requests were sufficiently favorable to the plaintiff; and that the third request for instructions was properly refused.

TORT by the administrator of the estate of Arabella Keith, for personal injuries sustained by the intestate, while in the employ of the defendant, a manufacturing corporation, by the burning of its mill.

At the trial in the Superior Court, before *Rockwell*, J., the plaintiff put in evidence tending to show that the intestate was injured in endeavoring to escape from the same fire in the defendant's mill, which was the subject of the preceding case; and put in similar evidence to show the cause of the fire, the mode in which the building was constructed, and the failure of the water to run. It also appeared that the intestate at that time was twenty years and seven months old, and there was no evidence that she was in any way a deficient or inferior person.

The plaintiff sought to maintain the action on account of the great liability of the mill to take fire, and for want of proper and suitable means and ways of escape therefrom in case of fire, and the want of proper means of extinguishing fire and giving alarm to the help in case of fire; and asked the judge to instruct the jury as follows: "It was the duty of the defendant to provide proper, suitable and sufficient means of extinguishing fire in its mill, and giving alarm thereof, and to have proper, suitable and sufficient ways and means of escape from the mill in case of fire; and, if the defendant failed therein, it is liable. If the intestate was injured in consequence of the insufficiency of the means of escape or the want of suitable appliances and

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apparatus for the extinguishment of fire, and giving alarm thereof, the plaintiff can maintain this action; and it matters not that the negligence of the other operatives or servants at work in the mill may have contributed to her injury. That would not prevent a recovery in this action, if she was not negligent in her acts or doings. It was the duty of the defendant to know that the place was unsafe, it having greater means of knowing the great risks of fire in such mills."

The judge declined to give these instructions in the form in which they were presented, but instructed the jury as follows: "If the plaintiff's intestate was at the time of the fire at work for the defendant, and if she and the defendant were equally capable of observing and understanding the means provided for the extinguishment of fire, and of egress from the burning building and of the risks from fire, there could be no recovery in this action, for these risks were assumed by her, and were a part of the consideration of her wages. This is the law, unless the plaintiff has shown, upon the evidence, affirmatively, the burden of proof being on the plaintiff, that his intestate was of less capacity than adult persons usually engaged in the same business; whether that is proved is a question for the jury. If the jury are satisfied that her capacity was thus deficient, then it is incumbent upon the plaintiff to show that the building and the room were not suitable places in which the plaintiff's intestate, she being herself in the exercise of due care, could do her work without exposure to dangers not coming within the obvious scope of her employment. If the jury are satisfied that the room was a suitable place, that suitable and proper means for the extinguishment of fire, according to the knowledge of the time, were furnished, and were in order and ready for use, and that the means of egress and escape from the building on fire were suitable and proper according to the knowledge of the time, and were in order and ready for use, the plaintiff cannot recover, even if his intestate was using due care. And the plaintiff cannot recover if the injury was caused by the acts or negligence of her fellow-workmen. The defendant was not an insurer of her absolute safety; its obligation was to furnish good and approved means to extinguish fire, and of getting out in case of fire, in the light of the practical science of that time. But if its system of pumps, pipes and hose was a good and

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approved system, it is sufficient for its justification, though there is conflicting testimony as to whether it is the very best system. It is to be assumed by the jury, that all the officers of the defendant were suitable persons, of competent skill and experience, and that the defendant had done its duty in respect of their selection. There was no duty upon the defendant to have special means or system of notifying the help of a fire."

The jury rendered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued in January 1877, and reargued in January 1878.

B. F. Butler, (*E. L. Barney* with him,) for the plaintiff.

T. M. Stetson, for the defendant.

ENDICOTT, J. We find no reason for sustaining the exceptions in this case. The rules of law applicable to it were stated in *Jones* v. *Granite Mills*, *ante*, 84. In both cases the injuries for which damages are sought to be recovered are of a similar character, and were occasioned by the same casualty. In the present case it was not contended that the fire was caused originally by the defendant.

The case was submitted to the jury; and the plaintiff requested the court to instruct them, 1st, that it was the duty of the defendant to provide proper and suitable means of extinguishing fire, 2d, proper and suitable ways and means of escape, and 3d, of giving alarm or notice to its servants in case of fire.

On the two first requests the court gave this instruction, in substance, that if the room was a suitable place, and there were proper and suitable means of extinguishing fire, and the means of egress and escape were suitable and proper, and in order and ready for use, then the plaintiff could not recover. This instruction, as applied to the first request, was sufficiently favorable to the plaintiff. Even if it was the duty of the defendant, in a case like this, to provide proper means of extinguishing fire, and to have the same ready for use, the jury have found the duty to have been performed. Upon the second request, the instructions were also sufficiently favorable to the plaintiff. For the reasons stated in *Jones* v. *Granite Mills*, the presiding judge might properly have declined to submit that question to the jury; and his rulings on that branch of the case, including those relating to

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the infancy and want of capacity of the plaintiff's intestate, became immaterial, and it is unnecessary to consider them further. The third instruction requested was properly refused. It is no part of the master's duty to his servants to provide special means of notifying them of a fire or other casualty occurring on his premises. The duty here sought to be imposed upon the master is of the same kind as that of providing means of escape, and is to be governed by the same principles. *Exceptions overruled.*

WILLIAM DEWEY *vs.* HENRY A. TOBEY.

Berkshire. Sept. 10, 1878. — Jan. 1, 1879. AMES & SOULE, JJ., absent.

If a levy of an execution is made on the land of a debtor who is absent from or not a resident of this state, a statement in the return of the officer that one of the appraisers was appointed by a person "who claimed to act as the authorized agent of" the debtor is insufficient, although the return states that the officer had caused three disinterested and discreet men to be sworn as appraisers, and sets forth the residence of the debtor in another state, and that he had no attorney in this state to the knowledge of the officer.

WRIT OF ENTRY, dated February 10, 1877, to recover a parcel of land in Alford. Plea, *nul disseisin.*

At the trial in the Superior Court, before *Rockwell*, J., without a jury, it was admitted that the demandant had formerly been owner of the demanded premises, and was entitled to maintain this action unless the tenant had a valid title to the demanded premises under the levy of an execution thereon in favor of the tenant against the demandant.

The demandant put in evidence the execution; the certificate of the officer that "Nicholas Race, Frederick Fitch and Ezra C. Ticknor made solemn oath that they would faithfully and impartially appraise such real estate as should be shown to them, as taken by force of this execution;" the certificate of the appraisers, which began as follows: "We, the subscribers, having been first duly chosen and sworn, as above certified;" and the return of the officer, dated December 7, 1870, which set forth that on that day he seized the real estate described, "and caused

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three disinterested and discreet men to be sworn as appraisers as above, to wit, Nicholas Race, who was appointed by the within named Henry A. Tobey, the creditor, Frederick Fitch, who was appointed by William Stoddard, who claimed to act as the authorized agent of the within named William Dewey, the debtor (the said debtor having removed to the State of New York, and having no attorney within this state to my knowledge,) and Ezra C. Ticknor, who was appointed by me, and the said Nicholas Race, Frederick Fitch and Ezra C. Ticknor, having been first duly sworn faithfully and impartially to appraise such real estate as should be shown to them, as taken by force of this execution, and the real estate above described, in three separate parcels, in the foregoing certificate of said appraisers, which is to be referred to for a description, having been so shown to them and to me by the said Henry A. Tobey as the estate of the said William Dewey, proceeded with me to view and examine the same so far as necessary to form a just estimate of its value, and appraised the whole of the three separate parcels of land at the sum of $1154.97;" and that he levied the execution upon said real estate, and delivered seisin and possession thereof to said Tobey, in full satisfaction of the execution.

The demandant contended that the levy was defective and invalid, because the officer in his return stated that an appraiser "was appointed by William Stoddard, who claimed to act as the authorized agent of the within named William Dewey, the debtor;" that to justify the officer in allowing Stoddard to make such appointment, the return of the officer should have stated positively the agency of Stoddard; and that it did not appear from the return that Stoddard had authority to choose an appraiser for the debtor, or was his agent or attorney for that purpose. The judge so ruled, and found for the demandant; and the tenant alleged exceptions.

J. Dewey, for the tenant. 1. An officer's return ought to receive a reasonable construction in accordance with the presumption that the officer has done his duty. *Blanchard* v. *Brooks*, 12 Pick. 47. *Ufford* v. *Dickinson*, 12 Allen, 543. *Herring* v. *Polley*, 8 Mass. 113. *Russell* v. *Hook*, 4 Greenl. 372. *Dodge* v. *Farnsworth*, 19 Maine, 278. *Roop* v. *Johnson*, 23 Maine, 335. *Peck* v. *Wallace*, 9 Conn. 453. *Booth* v. *Booth*, 7 Conn.

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350, 367. *Whittlesey* v. *Starr*, 8 Conn. 134. *Bill* v. *Pratt*, 5 Conn. 123.

2. In the case at bar, the certificate of the oath shows that the three appraisers were sworn as such before the officer. The certificate of the appraisers sets out that they had "been first duly chosen and sworn as above certified." The officer in his return states that he had "caused three disinterested and discreet men to be sworn as appraisers as above." He also sets out the facts authorizing an appointment by an agent, namely, Dewey's residence in the State of New York, and having no attorney in this state to the knowledge of the officer. The officer then, in words and legal effect, certifies that the three appraisers were "duly chosen," one by the creditor, one by himself, and one "by William Stoddard, who claimed to act as the authorized agent of the within named William Dewey, the debtor." The Gen. Sts. *c.* 103, § 25, prescribe that the return "shall set forth substantially the following facts and circumstances," and does not in terms require an appointment of an appraiser by an agent to be stated. The return having stated that Stoddard claimed to act as the authorized agent of Dewey, that he acted in making the appointment, and that the appraisers were duly chosen, to hold that this is not substantially a statement that the appraiser was chosen by a person authorized to act as agent for Dewey is, first, to falsify the officer's certificate that the appraisers were duly chosen; and, second, in disregard of the principle before laid down, to presume that the officer in violation of his duty, and at his own peril, allowed a man to act as agent whom he did not find to be such agent. There is no significance in the use of the word "chosen" in one place and "appointed" in another. They are words of the same legal effect. *Chappell* v. *Hunt*, 8 Gray, 427. If the court hold the agency of Stoddard to be insufficiently stated, the return might be construed as in substance setting forth a nomination by Stoddard and an appointment by the officer. *Herring* v. *Polley*, 8 Mass. 113. *Russell* v. *Hook*, 4 Greenl. 372.

M. Wilcox, for the demandant.

COLT, J. To give validity to the levy of an execution upon land taken by way of set-off, it must appear from the officer's return that the appraisers were appointed by himself, and the creditor and debtor; or that the debtor was absent from or not

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a resident in this state, and had no agent or attorney known to the officer, or neglected to appoint an appraiser, and that the officer appointed one for him, as the case may be. Gen. Sts. *c.* 103, §§ 3, 25.

The officer in this case returns that the debtor had removed to the State of New York, and had no attorney known to him within this state, and that one of the appraisers was appointed by a person "who claimed to act as the authorized agent of the within named William Dewey, the debtor." This is not sufficient. The debtor being absent from and not a resident of this state, a contingency had arisen in which his authorized agent might appoint in his stead. But the statute requires that such agent should be known to the officer as the debtor's agent or attorney, and, if not so known, then the officer must appoint for the debtor, and return the fact that there was no such agent or attorney known to him. The return in this case may be true, and yet the person who claimed to be an agent be a person wholly unauthorized and unknown by the debtor. The language of the return implies want of knowledge by the officer of the existence of the alleged agency. The law puts upon him the responsibility of determining the fact of agency, and makes his return conclusive in a real action to recover the land on the ground of an alleged defect in the levy. *Chappell* v. *Hunt*, 8 Gray, 427. *Dooley* v. *Wolcott*, 4 Allen, 406. In the case of this levy no action for a false return would lie against the sheriff, on the ground that the person claiming to act was not an agent of the defendant, because the return only is, that he claimed to act as such. The whole return is indeed to be construed together in ascertaining its meaning, but there is nothing in the other portions of it which can fairly control this result. The recital contained in their certificate, that the appraisers were duly chosen and sworn, which is made a part of the return, with the other recitals of the return referred to in the argument for the tenant, cannot control the plain statement that the second appraiser was appointed by one claiming to be an agent, and not by one known by the officer to be an agent.

Exceptions overruled.

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HENRY D. CONE *vs.* SHELDON E. FOREST.

Berkshire. Sept. 11, 1877. — Jan. 3, 1879. ENDICOTT & LORD, JJ., absent.

Under the Gen. Sts. *c.* 11, § 54, and *c.* 12, § 56, a collector of taxes, who, under a warrant committed to him by the assessors of a town, distrains and sells the property of a person for a school-district tax, is not deprived of his justification under the warrant, by reason of the fact that, to the amount of the tax voted, the assessors have added, "for the overlaying on said tax," a sum in excess of the five per cent authorized by the Gen. Sts. *c.* 11, § 32.

If a collector of taxes, who, under a warrant committed to him by the assessors of a town, has distrained the property of a person for a school-district tax, knowingly sells more of it than is necessary to satisfy the tax and all charges, he is liable in tort to the owner of the property for the excess.

COLT, J. This is an action of tort to recover the value of nine cows alleged to have been converted by the defendant to his own use. The defendant admits that he seized and sold the cows, and justifies his acts under a warrant issued to him, as collector of the town of Great Barrington, by the assessors of that town, directing him to collect a tax voted by one of the school districts of that town. At the trial it appeared by an inspection of the warrant, that to the amount voted by the district, namely $1800.11, was added the sum of $115.16 "for the overlaying on said tax." The plaintiff contended that, as the assessors added to the amount of the tax a sum exceeding five per cent thereof, the assessment was illegal, and the warrant furnished no justification to the defendant.

The statute provides that the assessors "may add to the amount of a tax to be assessed such sum, not exceeding five per cent thereof, as any fractional divisions of the amount may render convenient in the apportionment." Gen. Sts. *c.* 11, § 32. This provision, substantially, has been in force since the year 1785. Rev. Sts. *c.* 7, § 28. St. 1785, *c.* 50, § 11. Prior to that year it had been the common practice of assessors, either to suit their convenience in calculating the apportionment of the tax, or, with a view to meet abatements or defalcations and mistakes, to add to the amount of the tax voted a sum sufficient in their judgment to answer these purposes. *Colman* v. *Anderson*, 10 Mass. 105. But this was done without any statute authority; and in order to remove doubts as to the power of the assessors to do

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this, and, at the same time, to limit their discretion, the St. of 1785 was passed.

It is clear, that, under the law as it now exists, assessors have no right to add to the amount of the tax voted more than five per cent thereof, and that, if they do so, their assessment, for the amount of the excess, is illegal. It will not be necessary to consider whether this provision of the statute applies equally to school-district taxes; for we are of opinion, that the collector is protected by his warrant, notwithstanding the illegality of the assessment. He is entitled to the benefits which the law affords to ministerial officers in the service of process, issued by courts of competent jurisdiction, and is not bound to examine into the legality of previous proceedings. *Hubbard* v. *Garfield*, 102 Mass. 72. *Underwood* v. *Robinson*, 106 Mass. 296. *Rawson* v. *Spencer*, 113 Mass. 40.

Under the provisions of the Gen. Sts. *c.* 11, § 54, and *c.* 12, § 56, the illegality of this assessment, even if apparent on the face of the warrant, does not operate to defeat the defendant's justification. These provisions were first enacted in the St. of 1859, *c.* 118. That act was probably passed in consequence of the decision in *Goodrich* v. *Lunenburg*, 9 Gray, 88, in which it was held that an error of the assessors, in not assessing one sixth of the state tax upon the polls, vitiated the assessment, and that the plaintiff could recover the whole tax in a suit against the town. Section 4 of the St. of 1859, *c.* 118, provides that "whenever, by any erroneous or illegal assessment or apportionment of taxation, any party is assessed more or less than his due and legal proportion, such tax and assessment shall be void only to the extent of the illegal excess of taxation, whenever such exists; and no party shall recover, in any suit or process based upon such error or illegality, greater damages than the amount of such excess." In the revision of the following year, these provisions were separated, and are found, with slight changes of phraseology, in *cc.* 11 and 12 of the Gen. Sts. cited above; but we see no reason to suppose that the Legislature intended any change of the law.

The defendant is entitled to the protection afforded by these provisions. The excess in the overlaying was, within the meaning of the statutes, an "erroneous or illegal assessment or apportionment," by which the plaintiff was assessed more than his due

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proportion. The assessors had jurisdiction of the subject-matter; they acted under the vote of a legally constituted school district; the plaintiff was liable to assessment upon his property for the amount voted; all the proceedings were regular, with the single exception named. The purpose of the St. of 1859 was to prevent the embarrassment and delay in the collection of taxes caused by errors of assessment or apportionment, where, as in *Goodrich* v. *Lunenburg*, the extent of the error, and the amount of the illegal excess, could be ascertained. It is evident also, that, in order to give full force to its provisions, the collector must be protected in the collection of the whole tax assessed. The declaration of the statute, that no sale, contract or levy shall be avoided by reason of any such error or irregularity, implies this, and gives validity to the levy and sale. The collector is not required to correct errors of this description in the assessment. The sale cannot therefore be avoided, either in whole or in part. The plaintiff is left to his remedy against the school district for the illegal excess. The language admits of no other interpretation.

In *Shaw* v. *Becket*, 7 Cush. 442, it was decided that a person, of whom a tax illegally assessed had been collected by distress, could recover of the town only the amount of the tax with interest, and not the surplus value of the property sold, nor the cost of the distress; although in that case there was no remedy against the collector for the value of the property or the expenses incurred, because his warrant was sufficient authority for him; nor against the assessors, because by the statute they are exonerated from all liability, except when acting with want of fidelity and integrity. We adopt the language there used by the court, as equally applicable to this case: "Perhaps this rule will be found not to be so unreasonable in its operation, as may at first be imagined. The levy and sale can only take place after notice of the tax and demand of the payment of the same. The party has always the opportunity, before any expense is incurred, to avoid the same wholly, by payment of the tax. A payment, thus made to a collector clothed with authority to enforce by levy on the person or property, is not a voluntary payment that cannot be recovered back, but at once lays the foundation for an action against the town, a party always solvent and against whom an execution can be always easily satisfied. It is only, therefore, for a party denying the validity of a

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tax to pay the same, if demanded by the collector, and payment thereof insisted upon; and having done so, to institute his suit against the town to recover back the same." "It is to be borne in mind, that no such demand can be made for a tax, or necessity exist for paying an illegal one, except where such tax has been assessed by sworn officers of the law, and under all the forms of law."

In *Loud* v. *Charlestown*, 99 Mass. 208, where reference was had to the provision by which assessors are relieved from legal responsibility for an illegal assessment, and to the very provisions we are now considering, it was declared that the Legislature, in limiting and regulating the remedy, had regarded the remedy against the town as adequate and complete, having reference to the necessity of a prompt assessment and collection of taxes for the maintenance of government.

It follows that the defendant in this case committed no trespass in distraining the plaintiff's cattle under an insufficient warrant. The warrant in his hands was valid, notwithstanding the excess in overlaying. If the plaintiff wished to recover his property, and prevent the cost and expense of a sale, he had only to pay his tax to the collector under protest, and recover of the town the illegal excess.

If it be urged that the provisions of the Gen. Sts. *c.* 11, § 53, for the reassessment of taxes which are invalid by reason of any error or irregularity in the assessment, are inconsistent with the construction here given, the answer is, that the provisions of § 53 are all satisfied by applying them to cases where a party is assessed for less than his due proportion, or where the tax is assessed to the wrong person, or upon the wrong estate, and do not imply that there is any necessity for a reassessment of a tax like this, which is more than the due proportion, and which, when paid to the town or district, cannot be wholly recovered back.

The remaining question is whether the defendant became a trespasser by selling more of the property distrained than was necessary to pay the tax and all charges; and if so, to what extent he is to be treated as a trespasser.

If a person refuses or neglects to pay his tax, the collector is required to levy the same by distress or seizure and sale of his goods. The goods are to be kept by him, at the expense of the owner, at least four days, and then sold by public auction, and if

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sold for more than the tax, and all charges, the collector is required to return the surplus to the owner upon demand, with an account in writing of the sale and charges. Gen. Sts. *c.* 12, §§ 7, 8, 12. The provisions are minute, but they do not authorize or require the return of any property once taken. The surplus in cash is to be returned on the demand of the tax-payer. The proceedings however in this respect are to be governed by common-law rules, which control the right to distrain goods for rent or taxes. Blackstone says that goods distrained are for a time only a pledge in the hands of the distrainors, which they are bound, by an implied contract in law, to restore to the owner, on payment of the debt and expenses, before the time of sale; or, when sold, to render back the overplus. 2 Bl. Com. 452. It is well settled that an officer is answerable in trover for property sold on execution, after he has realized money sufficient to satisfy his writ. *Stead* v. *Gascoigne*, 8 Taunt. 527. *Batchelor* v. *Vyse*, 4 Mo. & Sc. 552. *Aldred* v. *Constable*, 6 Q. B. 370. *Seekins* v. *Goodale*, 61 Maine, 400. *Wolcott* v. *Root*, 2 Allen, 194.

It appears, from the report in this case, that the cows here distrained were sold separately, for the prices specified in the defendant's return; and that the sale of the first seven produced a sum sufficient to pay the full amount of the tax, cost of distraint, and the defendant's fees, and that this was known to the defendant at the time. It was the duty of the defendant thereupon to return, or to offer to return, the remaining cows. His act in proceeding to sell the same was a wrongful conversion of the property, for which he is liable in this action, but which does not render him a trespasser *ab initio*. *Seekins* v. *Goodale*, above cited.

Judgment must therefore be rendered in favor of the plaintiff for the value of the two cows as found by the jury.

J. Dewey, for the defendant.

M. Wilcox & J. M. Barker, for the plaintiff.

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HARDING G. WOODWARD *vs.* JAMES M. MUNSON.

Franklin. Sept. 17, 1878. — Jan. 3, 1879. ENDICOTT & SOULE, JJ., absent.

A receiptor who pays the amount of the execution issued on a judgment recovered against the debtor, after the officer has set off real estate of the debtor to the creditor in full satisfaction of the execution, cannot maintain an action against the debtor for money paid; and it is immaterial that the levy of the execution on the real estate was made under an arrangement between the receiptor and the creditor, by which the receiptor was to pay the judgment and take a deed of the land from the creditor, and that the land was afterwards sold, under a prior mortgage given by the debtor, for less than the amount of the mortgage debt.

CONTRACT for money paid. Trial in the Superior Court, before *Aldrich*, J., who, by consent of parties, before verdict, reported the case, for the determination of this court, in substance as follows:

Personal property of Munson was attached on a writ in favor of J. H. Gautier and others, and on October 16, 1875, Munson and Woodward signed and gave a receipt therefor to the attaching officer, in which it was agreed, in consideration of the officer allowing the property to remain in the possession of Munson, that the signers would on demand deliver the property to the officer, or, in case of neglecting or refusing to do so, that they would jointly and severally pay, on demand, to the officer, the amount of the debt and costs which should be recovered in the suit, together with all lawful fees upon such execution as might be placed in the hands of the officer.

The action, in which the attachment was made, was duly entered in court, and judgment was rendered thereon on August 26, 1876, and execution issued on September 4, 1876, and put in the hands of the officer, who demanded the property and the debt and costs of Woodward and Munson within thirty days after the rendition of the judgment, but the property was not delivered. Woodward testified that, when the demand was made, he told the officer to take the property, which was then in Munson's possession. The officer did not see the property, nor go where it was, as he had ascertained, since the attachment and taking the receipt, that the property was subject to two mortgages from Munson to the Franklin County National Bank, each purporting

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to secure the sum of $30,000, dated respectively August 16, 1875, and September 16, 1875, and recorded prior to the attachment. Each mortgage covered the property attached and all the other personal property of Munson in and about his premises in Greenfield. The mortgagees made no demand on the officer after the attachment. The attorney for the execution creditors directed the officer not to take the attached personal property from the receiptor, or levy the execution, unless it was free from both mortgages, and, for this reason, he did not accept the property or levy the execution.

By the return of the officer on the execution, it appeared that on September 25, 1876, he seized the real estate of Munson, which was also subject to a mortgage, and, by direction of the creditors' attorney, no further proceedings were had to complete the levy. On or about October 28, 1876, the officer commenced an action on the receipt against Woodward and Munson to recover the amount of the execution, but the writ was not served upon them because Woodward, under advice of counsel, promised to pay the debt. On October 31, 1876, the attorney for Woodward, with the assent of the attorney for the Gautiers, proceeded to levy the execution upon Munson's real estate, and it was appraised at $600 above a mortgage upon it, and set off to the execution creditors, as appears by the officer's return on the execution; and a deed of quitclaim from the execution creditors to Woodward of all the right, title and interest in the premises set off to them was given, that whatever might be realized therefrom by Woodward, if anything, might go in satisfaction toward the repayment of the money so paid by Woodward. The deed was dated November 7, 1876, and was delivered to Woodward on November 27, and, at the same time, Woodward paid the money to the amount of the execution and the expenses of the levy, and took up the receipt. In 1877, the real estate so set off and conveyed to Woodward was sold by the mortgagees, under a power of sale, and failed to bring enough to satisfy the debt secured thereby.

If the court should be of opinion that the action could be maintained on the foregoing facts and evidence, judgment was to be entered for the plaintiff for $582.24; otherwise, the plaintiff was to become nonsuit.

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D. Aiken & J. A. Aiken, for the plaintiff.

C. C. Conant, (*S. O. Lamb* with him,) for the defendant.

COLT, J. The plaintiff sues to recover money paid, as he contends, in discharge of his liability upon a receipt, given to an officer, for personal property attached on the writ, in an action in which a judgment was rendered against the defendant. The question submitted is whether the plaintiff can maintain this action on the facts stated in the report.

It appears that the judgment was rendered on August 26, 1876; and that, upon the execution issued thereon, a demand was duly made on the receipt, for the property attached. This demand was not complied with by a delivery to the officer. The real estate of the defendant was also taken on the execution, by a levy which was completed on October 31, and by reason of which the execution was returned wholly satisfied. The return of the officer is conclusive upon the parties to that suit and their privies. *Pullen* v. *Haynes*, 11 Gray, 379.

A deed from the execution creditors, of all right, title and interest in the land levied on, was delivered to the plaintiff in this action on November 27, upon his paying the amount of the execution and the costs thereon. At the same time, the plaintiff's receipt for the goods attached, upon which an action had been commenced, was given up to him. By this levy, the debt secured by the attachment of the property, for which the receipt was given, was paid and satisfied, and the plaintiff's liability on the receipt discharged. The execution creditors, after the execution was returned and recorded, had no power to waive the levy and render it void, on account of any supposed error or defect in the proceedings; nor had they the right to resort to any other remedies for the satisfaction of the judgment without first causing the levy to be set aside by writ of *scire facias*. Gen. Sts. *c.* 103, §§ 20, 22.

Under these circumstances, the transactions set forth in the report amount, at most, only to an arrangement entered into without the knowledge of the defendant in this action, by which, in order to relieve himself from liability on his receipt, the plaintiff agreed to take a deed of the land levied on, and to pay therefor the amount of the judgment debt. If, by reason of the depreciation in real estate, the land is not now worth

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the amount for which it was appraised when taken on execution, the defendant cannot in this way be called on to make it good. *Plaintiff nonsuit.*

CHESTER C. CONANT, Judge of Probate, *vs.* DANIEL H. NEWTON & another.

Franklin. Sept. 17, 1878.—Jan. 7, 1879. ENDICOTT & SOULE, JJ., absent.

A bond given to a judge of probate by a person who is simply a trustee under an oral appointment, is not a valid probate bond; and the sureties on the bond are not estopped from setting up that defence by a recital in the bond that such person "had been duly appointed trustee."

The St. of 1873, c. 253, relating to bonds given in the Probate Court, where there is any want of jurisdiction in the court, is not retrospective.

A bond given to a judge of probate by a person who is simply a trustee under an oral appointment, and which is not a valid probate bond, is not good at common law, if the sureties on the bond signed it under a mistaken belief that the trustee was subject to the jurisdiction of the Probate Court.

CONTRACT against the sureties on a bond executed on October 4, 1870, by them, and by Joel S. Sanderson as principal, to the Judge of the Probate Court for the county of Franklin, in the sum of $15,000, and containing the following condition:

"The condition of this obligation is such that if the above bounden Joel S. Sanderson, who has been duly appointed trustee of the estate of Mary Ward, of Montague, in said county of Franklin, shall: First, make a true inventory of all the real estate, goods, chattels, rights and credits belonging to him as trustee, and which shall come to his possession or knowledge, and return the same into the Probate Court for the county of Franklin within three months, the judge having so directed; Second, dispose of and manage all such estate and effects, and faithfully discharge his trust in relation thereto according to law; Third, render an account, on oath, of the property in his hands, and of the management and disposition thereof, within one year, and at any other times when required by said court; and, Fourth, at the expiration of his trust, settle his accounts with said court, and pay over and deliver all the estate and effects remaining in his hands or due from him on such settle

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had no power to require and take a bond, any more than it would have to require or take a bond for the performance or security of any oral agreement between parties. The plaintiff relies upon the St. of 1873, *c.* 253, as giving validity to this bond as a probate bond. Section 1 provides that "whenever an appointment of an executor, administrator, guardian or trustee, by any Probate Court, shall be vacated or declared void by reason of any irregularity, or want of jurisdiction or authority of the court making the same, the person so appointed such executor, administrator, guardian or trustee shall be held to account for all money, property or assets which shall have come to his hands as executor, administrator, guardian or trustee, or by reason of such appointment, in the same manner as if the appointment had been regular and valid; and any bond given in pursuance of such appointment shall be held to be valid and binding both on principals and sureties thereon, for that purpose."

We are not called upon to consider whether this statute applies to a case, like the present, where the Probate Court has no jurisdiction over the parties or the subject-matter, but in which all the proceedings are *coram non judice* and void. If it does, we are of opinion, that it cannot affect this case, because the bond in suit was executed before the statute was passed. The general rule of construction, that a statute is not held to be retrospective so as to affect the past transactions and fixed rights of the subject, unless such is clearly and unequivocally the intention of the Legislature, applies to this statute. To construe it as retroactive as to the sureties upon bonds, would be to hold that the Legislature intended to enlarge their liabilities and to create by statute and impose upon them different contracts from those into which they had voluntarily entered. This is not the necessary construction, and it is not to be presumed that such was the intention. *Fickett* v. *Durham*, 119 Mass. 159. *Hill* v. *Duncan*, 110 Mass. 238, and cases cited.

The ground taken by the plaintiff, that the recital in the bond that Sanderson had been duly appointed trustee of the estate of Mary Ward estops the defendants from now contending that it is not a valid probate bond, cannot be sustained. The obligee had no lawful authority to require or take the bond. A mis-

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recital in the bond induced by a mutual mistake of fact cannot operate by way of estoppel to give validity to the bond.

The remaining question is whether the defendants can be held liable upon the bond in suit as a good bond at common law.

There are numerous cases in which bonds intended to be official or statutory bonds, but which varied in some respects from the requirements of the statutes, have been held to be valid and binding at common law. As stated in *Bank of Brighton* v *Smith*, 5 Allen, 413, this is upon the principle "that, although the instrument may not conform to the special provisions of a statute or regulation in compliance with which the parties executed it, nevertheless it is a contract voluntarily entered into upon a sufficient consideration, for a purpose not contrary to law, and therefore it is obligatory on the parties to it in like manner as any other contract or agreement is held valid at common law." But this rule cannot be extended to cases in which, to hold the parties liable as upon a bond at common law would be to charge them with liabilities and obligations greater than or different from those which they assumed in the instrument executed by them.

In the case at bar, the bond was given with the belief and understanding that the Probate Court had duly appointed Sanderson trustee of the estate of Mary Ward, that it had jurisdiction over him, that it had the right to require him to account at any time, and to exercise over him the supervision and control which the law gives to the Probate Courts in cases of trustees duly appointed. The condition is, that Sanderson shall make and return a true inventory within three months; shall dispose of and manage the estate and faithfully discharge his trust in relation thereto according to law; shall render an account on oath within one year, and at any other time when required by said court; and shall at the expiration of his trust account for and pay over the estate to the person entitled thereto. It is manifest that all these provisions look to a due administration of the estate under the direction of the Probate Court according to the law.

But as the Probate Court had no jurisdiction whatever in the matter, the judge had no authority to require Sanderson to render an account, or to remove him for unfaithfulness, or to punish him for contempt in disobeying any orders, or generally

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to exercise over him any control or direction, and it was legally impossible to perform the conditions of the bond according to its true spirit and meaning.

In order to hold the defendants liable as on a bond at common law, we must treat this bond as if its condition was solely that Sanderson should faithfully manage and pay over the estate in his hands to the person entitled to it. But this was not the obligation which the defendants intended or consented to assume. They intended to become liable as sureties for one who was under the jurisdiction of the Probate Court, and who in administering the estate must conform to the rules and practice of that court. To hold them bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of the Probate Court would be to change the character of their contract and to increase their liability.

We are therefore of opinion that the defendants are not liable upon the bond in suit. *Judgment for defendants.*

F. E. Gray *vs.* William James & another.

Hampden. Sept. 25, 1878. — Jan. 3, 1879. Ames & Soule, JJ., absent.

In an action upon an order alleged to be drawn on the defendant by A., payable to the plaintiff and accepted by the defendant, it appeared that B. contracted for the building of a church for a religious society; that the defendant agreed with B. to furnish the mason work and materials, and A. contracted with the defendant for the performance of part of the work; that, during the work, the tower of the church was found to be defective, and the society caused it to be partly taken down, and took possession and disposed of the materials; that the tower has since remained in the condition in which it was then left, except that, on finishing the church for occupancy, it was roofed over; that the order sued on was drawn on the defendant by A., payable "from percentage retained on work" upon the church, and accepted by the defendant payable "when the work is accepted by the church;" that, before the acceptance of the order, the completion of the tower had been abandoned by the mutual consent of all parties; and no steps, after the discovery of the defect, were taken by either the contractors or the society for further work upon it; that the society contended that the work on the tower was not done according to the contract, and, on that account, withheld from B. several thousand dollars, who in turn withheld the same from the defendant, out of the amount due by the terms of the contract; and that, when the defect was discovered, it was in dispute between the parties whether it was caused by poor materials, improper workmanship, or a defect in the plan.

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The plaintiff offered evidence tending to show that the defect was in the plan; and that the work and materials were in accordance with the plan and specifications, which were approved by the architect and superintendent, and such as were required by the terms of the contract. It further appeared that, after the abandonment of the work on the tower, the rest of the church was completed by B., who was paid therefor in full, excepting the amount withheld; that the society then took possession of the church, and have had exclusive occupancy of it since; and that, when possession was taken, the officers of the society stated to B. that it was to be without prejudice to its rights in regard to the alleged defect, and this was assented to by B., who afterwards went into bankruptcy, and the claim of his estate against the society for the whole amount withheld on the contract was sold by his assignee, and purchased for a small sum for the benefit of the society. *Held*, upon the above evidence, that whether the plaintiff had shown such an acceptance of the work by the society as would entitle him to recover on the order, was a question of fact for the jury.

CONTRACT upon two orders alleged to be drawn on the defendants by John O'Flaherty, payable to the plaintiff and accepted by the defendants. Writ dated February 19, 1878. Trial in the Superior Court, before *Allen*, J., who ruled that the plaintiff could not recover; directed a verdict for the defendants; and reported the case for the determination of this court. The facts appear in the opinion.

G. Wells, for the plaintiff.

M. P. Knowlton, for the defendants.

COLT, J. It appears from the facts stated in this report, that Charles L. Shaw contracted for the building of a church edifice for a religious society in Springfield. Under this contract, the defendants agreed with Shaw to furnish the mason work and materials, and O'Flaherty contracted with the defendants for the performance of part of their work. During the progress of the work, it was discovered, in December 1875, that the tower of the church was defective, and soon after the society caused it to be partly taken down and took possession of the materials and disposed of the same. The tower has since remained in the condition in which it was then left, except that, on finishing the church for occupancy, it was roofed over.

This action is to recover on two orders, drawn by O'Flaherty on the defendants, one in July, and the other in September 1875. both made payable "from percentage retained on work" upon the church, and each accepted by the defendants in March following, payable "when the work is accepted by the church." Before the acceptance of these orders, the completion of the

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tower had been abandoned by the mutual consent of all parties, and no steps, after the discovery of the defect, were taken by either the contractors or the society for the further prosecution of the work upon it, nor has any request been made therefor.

The society contended that the work on the tower was not done according to the contract, and on that account withheld from Shaw, the contractor, several thousand dollars, who in turn withheld the same from the defendants, out of the amount due by the terms of the contract. But there was evidence at the trial, that, when the defect was discovered, it was in dispute between the parties whether it was caused by poor materials, improper workmanship, or a defect in the plan. The plaintiff offered evidence tending to show that the defect was in the plan, and that the work and materials were in accordance with the plan and specifications, were approved by the architect and superintendent, and such as were required by the terms of the contract. After the abandoment of the work on the tower, the rest of the church was completed by the contractor, who was paid therefor in full, excepting the amount withheld as above stated.

In May 1876, the society took possession of the church edifice, and have had exclusive occupancy of it since. When possession was taken, the officers of the society stated to the contractor, that it was to be without prejudice to its right in regard to the alleged defect, and this was assented to by the contractor. Shaw afterwards went into bankruptcy, and the claim of his estate against the society for the whole amount withheld on the contract was sold by his assignee, and was purchased for a small sum, for the benefit of the society, by one of its officers.

Upon this state of the case, it could not properly be ruled, as matter of law, that the plaintiff had not shown such an acceptance of the work by the society as would entitle him to recover upon these orders. There was evidence that the completion of the tower was dispensed with by the society, and abandoned by all parties. There was evidence put in by the plaintiff that the imperfection discovered in it was not caused by the fault of the contractors, but by a defect in the plan. This question has never been tried and settled between the parties. A material question of fact is open. If the plaintiff's claim in this respect is estab-

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lished, then the conduct of the society in taking possession of and occupying the church, might be well found to be an acceptance of it as a sufficient fulfilment of the contract, notwithstanding any verbal claim to the contrary made at the time. The effect of such a claim was only to prevent the acceptance from being evidence of a waiver of any claim for defects. These considerations dispose of the case, and render it unnecessary to consider whether the point is well taken, that, by the true construction of the written orders and acceptances, payment is to be made whenever such possession is taken as would give the contractors a right to be paid upon a *quantum meruit*, for the work and materials of which the society had the benefit. The plaintiff, upon a less favorable construction, is entitled to go to the jury.

New trial ordered.

STEPHEN SPELMAN *vs.* BENNET ALDRICH & trustee.

Hampden. Sept. 24, 1878. — Jan. 7, 1879. AMES & SOULE, JJ., absent.

A pension check payable to the order of A. was received by his attorney from the United States pension office, and indorsed by A. The attorney then took the check and went with A. and his wife to a savings bank, and deposited, with their consent, a part of the amount of the check in the name of the wife, and gave her the rest of the amount. *Held*, that the amount deposited remained the property of the husband, and was liable to attachment by his creditors.

TRUSTEE PROCESS. Writ dated July 23, 1874, returnable to the Superior Court. The Woronoco Savings Bank, summoned as trustee, answered that, at the time of the service of the writ, it had in its hands and possession the sum of $200, standing in the name of Sarah E. Aldrich, and denied that it had any goods, effects or credits in its hands and possession in the name of Bennet Aldrich. C. K. Lambson appeared as claimant of the funds in the hands of the trustee. The defendant was defaulted; and the case was tried between the plaintiff and claimant before *Gardner*, J., without a jury.

It was agreed that the claimant was administrator of the estate of Sarah E. Aldrich, the deceased wife of the defendant, who died before any service of the process. It appeared in evidence

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that the defendant was entitled to a lapsed pension from the United States; that he applied to an attorney to get the pension restored; that the latter agreed to get it restored, on condition that, if successful, the defendant would give the amount received to his wife, that the draft for said amount should never go into the defendant's hands, that the attorney should retain the draft, and the defendant should indorse it, and that the attorney should then deposit it in a savings bank in the name of the wife as her property; that the defendant assented to this arrangement, and in pursuance thereof, three or four months after, the attorney obtained from the United States pension office a draft for about $300, payable to the order of the defendant; that thereupon the attorney sent for the defendant, who came to his office; that the attorney placed the draft upon the table before the defendant, who indorsed the same, not taking it up; that the attorney took the draft, sent for the defendant's wife, and the three went to the trustee bank, and in their presence the attorney deposited $250 in the bank in the name of Sarah E. Aldrich, she signing the bank-book, and receiving a book in her own name; and that the attorney gave her the balance of the amount of the draft, being about $50.

The plaintiff was a creditor of the defendant upon an account due before the above arrangement with the attorney was entered into; the defendant, in presence of his wife, promised to pay the plaintiff out of the pension money when received; while the application was pending, both husband and wife agreed that the plaintiff should be paid out of the pension money when received; when the draft was received, neither the defendant nor his wife had any visible property; and the arrangement with the attorney was made fraudulently, to prevent the money from being attached by the defendant's creditors.

The claimant admitted that no consideration passed between the defendant and his wife, and that the pension check was a voluntary gift by the husband to the wife through the intervention of the attorney; and asked the judge to rule that the pension was exempt from attachment, that it never came into the defendant's hands in other form than as exempted by law, and that the trustee should be discharged.

The judge refused so to rule; found the facts as above stated,

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and that the draft was passed to the defendant by the attorney for the sole purpose of making it negotiable; ruled that the money in the hands of the trustee was not exempt from attachment by a creditor of the defendant; and ordered the trustee to be charged. The claimant alleged exceptions.

G. M. Stearns, for the claimant. 1. The agreement between the attorney and the defendant operated to convey the pension check, when it should arrive, to the wife. When the attorney received the check, he received it for the wife. It was not delivered to the defendant, but was indorsed by the defendant, not as an act of ownership, but to make it negotiable, so that it might be used by the wife. It was then delivered to the wife by making the deposit, with the consent of the defendant and his wife, in her name. Such a conveyance is not void under the U. S. Rev. Sts. § 4745. If it is, creditors cannot avoid it. It is for the protection of the pensioner, and strangers cannot set it aside The statute does not apply to a pension check, but only to some right in the grant itself, so that the pensioner may be deprived of the future benefit of the grant. The last half of the section makes provision for the protection of the "money" of "any person entitled to a pension" when it shall be ready for collection, showing that the earlier provision is limited to rights in the grant itself, and does not extend to the money when payable. Furthermore, the statute does not forbid contracts of gift, but only sales.

2. If the arrangement was void, and the present plaintiff can avail himself of the invalidity, the defendant could make a gift of the pension-check when received by the attorney. He could give it away then, as well as get it cashed at a bank. He could give it to his wife apart from the rights of creditors, through a third person, or by depositing it in a savings bank, and thus perfecting a delivery. *Adams* v. *Brackett*, 5 Met. 280. *Ames* v. *Chew*, 5 Met. 320, 323. *Fisk* v. *Cushman*, 6 Cush. 20. *McCluskey* v. *Provident Institution for Savings*, 103 Mass. 300. *Whitney* v. *Wheeler*, 116 Mass. 490. The wife having died before service of process, and the husband never having reduced the *chose in action* to possession during her lifetime, the same passed to her administrator. 2 Bl. Com. 433–435. *Allen* v. *Wilkins*, 3 Allen, 321.

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8. The conveyance or gift of the pension check to the wife was not invalid as against creditors, on the ground that Aldrich held it exempt from attachment by creditors. U. S. Rev. Sts. § 4747. *Stevenson* v. *White*, 5 Allen, 148. If the attempted conveyance before the collection of the pension was valid, there can be no doubt it was disposed of while exempted under the statute aforesaid. But if no valid disposal of the money had been made up to the time the check came to the attorney, it was still exempted in his hands, and the defendant might give it away. It was in "course of transmission," while in the hands of the intermediate collecting parties. *Kellogg* v. *Waite*, 12 Allen, 529. Furthermore, it was in "course of transmission" while represented by a pension check. By the U. S. Rev. Sts. § 4765, it is provided that pensions shall be paid by check, and a check is made an instrumentality of transmitting the money to the pensioner. Until he gets the money, it is "in course of transmission." But if it shall be held that the check was the "sum of money due" to the pensioner named in § 4747, and that the receipt of the same by the attorney was payment of the "money" to the defendant, then the money was exempt in the hands of the defend ant, so long as the defendant held the identical money or check paid him by the United States. The statute provides that "no sum of money due, or to become due, to any pensioner, shall be liable to attachment," and it "shall inure wholly to the benefit of such pensioner." The creditors have no rights in that money. The "sum of money" is exempt until the pensioner uses it. It would be absurd to hold that the money is exempt before he gets it, while he can get no benefit from it, for he is forbidden to sell it, and that as soon as it is paid to him so that he can derive any benefit from it, the exemption ceases.

M. B. Whitney, for the plaintiff.

MORTON, J. We do not deem it necessary to discuss all the questions presented by the learned counsel for the claimant, because our opinion upon one of them is decisive of the rights of the parties.

The money in the hands of the trustee was deposited by the defendant in the name of his wife, but it was at no time her sole and separate property, free from the control of her husband, or from attachment by his creditors. A married woman cannot

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acquire property to be held as her sole and separate property by gift from her husband. Gen. Sts. c. 108, § 10. Though such a gift may be so far valid as to give the wife a right to the property at the death of the husband, as against his heirs or executors, it is invalid as to his creditors. Property thus given remains the property of the husband during his life, and may be demanded by him or attached by his creditors. *Adams* v. *Brackett*, 5 Met. 280. *Ames* v. *Chew*, 5 Met. 320. *Thomson* v. *O'Sullivan*, 6 Allen, 303. *Gay* v. *Kingsley*, 11 Allen, 345. *McCluskey* v. *Provident Institution for Savings*, 103 Mass. 300.

It follows that, in this case, the credit in the hands of the trustee belonged to the defendant, and his creditors could attach it by the trustee process, irrespectively of the question whether the gift was made to the wife with a purpose of defrauding creditors. This question, and also the question whether at the time of the deposit the pension check was exempt from attachment, are immaterial. Even if, by the laws of the United States, the pension was exempt from attachment while it remained in the form of a pension check, the exemption certainly ceased after the money was drawn upon the check. *Kellogg* v. *Waite*, 12 Allen, 529. The money then became effects or credits in the hands of the bank belonging to the defendant, and was attachable by the plaintiff. *Exceptions overruled.*

JOHN J. O'CONNOR *vs.* JOHANNA CAVAN & trustee.

Hampden. January 14.—29, 1879. COLT & AMES, JJ., absent.

In a trustee process, a duly recorded assignment of wages by the defendant is valid against an attaching creditor, under the St. of 1865, c. 43, § 2, although the assignment is signed by the name "Johanna Kavanagh," while the defendant's last name is in fact "Fitzgerald," and she works for the trustee under the name of "Cavan," and is generally known by that name.

TRUSTEE PROCESS. Writ dated November 15, 1877. The principal defendant was named in the writ as Johanna Cavan, alias Johanna Fitzgerald. The Chicopee Manufacturing Company, summoned as trustee, answered that, at the time of ser-

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vice upon it, it had in its hands the sum of $43.23, "wages earned by the personal service of said defendant." Eugene Munn appeared as claimant of the funds in the hands of the trustee, by virtue of the following assignment: "Paymaster of the Chicopee Manfg. Co. Please pay Eugene Munn what there is due me and what may be due me the next six months, and this will be your receipt for the same. Joanna Kavanagh. Chicopee Falls, Octo. 19, 1877." The defendant was defaulted; and the case was submitted to the Superior Court upon the following agreed facts:

The defendant was married to Thomas Fitzgerald in 1860, and they have lived together as husband and wife up to the present time. The defendant has been known in the community by her maiden name, Johanna Cavan, and by her married name, Johanna Fitzgerald. She had worked and did work at the time of the assignment and suit for the trustee under the name of Johanna Cavan. The claimant has, for the space of several years, charged goods to her on his books under the name of Johanna Cavan, and has previously taken assignments from her under that name, which have been accepted by the trustee.

At the date of the present assignment, the defendant was indebted to the claimant in a sum exceeding the amount in the trustee's hands. The assignment in question was executed by the defendant, and was recorded.

If, upon these facts, the assignment was valid as against the defendant's creditors, judgment was to be entered for the claimant; otherwise, the trustee was to be charged.

The Superior Court ordered the trustee to be discharged; and the plaintiff appealed to this court.

C. J. Bellamy, for the plaintiff.

W. G. White, for the claimant.

By the Court. The case is governed by *Ouimet* v. *Sirois*, 124 Mass. 162. *Judgment affirmed.*

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LORENZO PLIMPTON *vs.* ELIZA C. GOODELL.

Worcester. Oct. 8, 1878. — Jan. 4, 1879. AMES & SOULE, JJ., absent.

A., a married woman, jointly and severally with her husband, signed a note in 1869, payable to B., given in renewal of a note signed in the same manner, payable to C., administrator, for land belonging to the estate of her mother conveyed by the other heirs to A. alone. The real estate of the mother had been divided by an auction sale among the heirs. C. was administrator of the estate, and acted, in the sale of the real estate, as agent for all the heirs; and immediately transferred the original note to B. and his wife, who was one of the heirs, in payment of her share of the estate. *Held*, in an action on the second note by B. against A., that the facts showed a sufficient consideration for the note; and that the addition of "administrator" to C.'s name, as payee of the original note, did not change the effect of those facts.

CONTRACT on a promissory note for $729, payable to the plaintiff or bearer. Trial in the Superior Court, before *Allen*, J., who ordered a verdict for the plaintiff for the full amount of the note, and reported the case for the consideration of this court. The facts appear in the opinion.

J. M. Cochran, for the defendant.

A. J. Bartholomew, for the plaintiff.

COLT, J. The promissory note in suit was executed by the defendant jointly and severally with her husband, since deceased. Her only defence at the trial was, that there was not sufficient consideration shown to charge the defendant, she being a married woman when the note was given, for the whole or any part of the note. The court ruled otherwise, and ordered a verdict for the plaintiff for the full amount; and, without doubt, this ruling is correct.

The note was given in April 1869, in renewal of a note, originally made in January 1866, by the defendant and her husband, payable to the order of Daniel M. Chamberlin, administrator, to pay for a part of the land belonging to the estate of her mother, which was conveyed by the other heirs to this defendant alone. It appears that the real estate of the mother, after her decease, was divided by an auction sale of the different parcels among the heirs. Chamberlin was administrator of the mother's estate, and acted in the sale of the real estate as agent for all the heirs. In a settlement by him as administrator, and as agent,

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made with the defendant and her husband, a sum was found due, made up of what was owing to the administrator from the husband alone, and of the balance due from the defendant on account of the real estate conveyed to her, for which several notes were given to Chamberlin, as administrator, signed by both husband and wife. One of these notes was immediately transferred to the plaintiff and his wife, who was one of the heirs, in payment for her share of the estate, and the note in suit is a renewal of that note. The other notes received by Chamberlin in settlement were kept by him, and were all paid by the defendant's husband before the note in suit was given in renewal. The original note was given for an amount somewhat less than the balance due from the defendant, for the real estate conveyed to her.

These facts show a good consideration for the note, moving directly to the defendant. For the convenience of all parties, the original note was made payable to Chamberlin, who was acting as their agent. The delivery of it by him to the plaintiff and his wife in payment for the interest of the latter in her mother's estate, and the subsequent giving of this note by the defendant in renewal, after the other notes signed by herself and her husband, and given for the debt of the husband, had been paid by him, is conclusive evidence that the consideration for the note in suit was the renewal of a note given for land conveyed to the defendant.

The addition of the word "administrator" to Chamberlin's name as payee of the note, is not sufficient to change the effect of the admitted facts. It is a matter of description only.

Judgment on the verdict.

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ISAAC A. ALLING & others *vs.* BOSTON & ALBANY RAILROAD COMPANY.

Worcester. Oct. 2, 1878. — Jan. 7, 1879. COLT, J., did not sit. AMES & SOULE, JJ., absent.

If a passenger delivers to a railroad company a trunk containing samples of merchandise belonging to a third person, whose agent he is, to be transported to a place to which he has a ticket, the only contract entered into is for the transportation of the personal baggage of the agent, and the company is not liable in contract to the owner of the trunk for its loss; nor in tort, except for gross negligence; and evidence that a large part of the defendant's business consists in transporting passengers known as commercial travellers, with trunks like the one lost, containing merchandise, that such trunks are known as sample trunks and are of special construction, and that such travellers purchase tickets for the ordinary passenger trains and receive checks for their trunks, and are transported for the price of the tickets, is immaterial.

CONTRACT, with counts in tort, to recover the value of a trunk and a quantity of jewelry therein contained, delivered to the defendant, to be carried from Worcester to Hartford. Trial in this court, before *Endicott*, J., who reported the case for the consideration of the full court, in substance as follows:

The defendant owns and operates a railroad which extends from Boston to Worcester and thence to Springfield, and at Springfield connects with a railroad which extends to Hartford and thence to New York. The defendant is accustomed to sell tickets and check baggage for passenger trains over said railroads between Boston and New York, and the intermediate stations.

George W. Kerr testified that he was a travelling salesman for the plaintiffs, manufacturers of jewelry; that in the morning of May 11, 1877, he bought of the defendant, in Boston, a ticket for New York, by way of Worcester, Springfield, and Hartford, and had a trunk containing jewelry belonging to the plaintiffs, of the value of about $10,000, checked to Worcester, where he stopped and received the trunk; that in the afternoon he took the trunk to the defendant's station at Worcester and requested that it should be checked for Hartford, which was done, and he received the corresponding check, took the cars, which were just leaving the station, and went to Springfield, where he remained all night, and went the next morning to Hartford, where, on demanding the trunk, a bag was offered to him, which had a check

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on it corresponding to the one given him at Worcester; that he next saw the trunk in New York broken open and the contents gone; that, when he delivered the trunk to the defendant's servants at Worcester, no inquiry was made as to what it contained; that the trunk was a sample trunk used for carrying merchandise, and weighed with its contents one hundred and thirty-five pounds; that he had been to Worcester several times by the defendant's road, and always carried the trunk containing jewelry with him.

Samuel Knowlton testified in behalf of the plaintiffs, that he was an assistant baggage-master of the defendant, and checked Kerr's trunk at Worcester for Hartford; that the trunk was a sample trunk, iron-bound and heavy; that he lifted it and made no extra charge for it; that he did not know that it contained merchandise, or what was in it; that the trunk when checked was put in the usual place for baggage going west; that the same afternoon a man brought a black bag which was checked for New York and placed upon Kerr's trunk.

George F. Stickney testified in behalf of the plaintiffs, that he was an assistant baggage-master of the defendant; that, at about half past seven in the evening of the day when Kerr's trunk was left at the station in Worcester, a man climbed over the counter into the baggage-room and asked leave to put a bundle in a bag, and exhibited the check of the bag which was then upon Kerr's trunk; that the witness took the check off the bag, and the man opened the bag and put the bundle in; that the witness then put the check back on the bag and put the bag on the trunk; that he was then called by a man at the window, and went to the window, and, while he was talking there, the man at the bag went out of the room by the door; that the trunk was put on the train for New York at half past ten that night, and had a New York check on it; that he did not know there had been a change of checks; and that he should not call the trunk a sample trunk.

It appeared that the trunk was carried to New York and there delivered to the person who changed the checks, or to his confederate, and that the trunk and its contents were stolen. And the plaintiffs contended that this was in consequence of the change of checks at the Worcester station.

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It also appeared that the trunk was twenty-eight inches long, sixteen and a half inches wide, and eighteen inches high, weighing when empty sixty-five pounds, and with its contents, when delivered to the defendant, one hundred and thirty-five pounds; that it had four strong iron hinges visible on the outside, two of which were twelve inches long, and two four and a half inches long; that it had five parallel bands of sheet-iron, each one and a quarter inches in width, passing entirely around the trunk in one direction, and one band of sheet-iron one and a half inches in width going entirely round the lid of the trunk in the other direction; that it had six sheet-iron clamps or braces on the top, eight on the sides, and six on the bottom, four of those on the bottom being one fourth of an inch thick and twelve inches in length; that the band round the lid and the four heavy clamps or braces on the bottom were fastened by iron rivets, and the other clamps or bands were fastened by iron nails driven through and clinched; that the trunk was of the same shape and size with trunks ordinarily used by travellers for personal baggage, covered with black leather, with a lid opening on top swinging on hinges at the back, the lock covered by a leather covering buckled down and with the iron bands before referred to, and straps of substantially the same color with the covering of the trunk.

The plaintiffs offered to prove that this class of trunks is used for transporting merchandise, and for that purpose only, and was manufactured for that purpose solely, and that these trunks are carried on the defendant's railroad extensively; that a large part of the defendant's business consisted in transporting a large class of passengers known as commercial travellers, with trunks like this, containing merchandise of great value, and that these trunks are known as sample or merchandise trunks, and are of special construction, and in the course of that business the commercial travellers purchase tickets for the ordinary passenger trains and receive checks for their said trunks, and the defendant undertakes to transport the traveller and trunk accordingly for the price of the ticket; that the foregoing business is so pursued on railroads generally; that large numbers of persons, constituting a considerable proportion of the passengers on some full trains, are in the habit of passing over the defendant's road with trunks like this, which are generally known to be used for the transportation of mer-

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chandise; and the plaintiffs contended that the jury might infer the knowledge of the defendant from this general knowledge and custom, and that the jury might find that the defendant received the trunk without inquiring as to its contents, and with notice that it contained merchandise, and not personal baggage, and that the defendant was guilty of a degree of negligence sufficient to render it liable for the loss of the trunk and contents, and that the jury might find for the plaintiffs. The judge refused to admit the evidence offered; and the plaintiffs excepted.

The defendant contended, on the evidence, "1. That there was no contract with the plaintiffs, and could be no recovery on the counts in contract. 2. That there was no evidence tending to show that the defendant had any knowledge that the trunk contained merchandise. 3. That there was no evidence that the baggage-master had any authority to receive for transportation anything but personal baggage. 4. That this trunk was delivered, under the circumstances, as the personal baggage of Kerr, and received as such, and therefore the defendant owed no duty with reference to it, and could not be held to exercise any degree of diligence in regard to it. 5. That there was no evidence to show gross negligence on the defendant's part, or any negligence sufficient to charge it. 6. That the conduct of Kerr in sending forward the trunk, under the circumstances, on a train he was not going upon from Springfield to Hartford was, as matter of law, such negligence, contributing to or causing the loss, as to prevent the plaintiffs from recovering. 7. That on the evidence the only contract the defendant made was to carry the personal baggage of Kerr, and that there was no evidence of fraud or gross negligence on its part, and therefore the plaintiffs could not recover."

The judge took the case from the jury, and reserved for the consideration of the full court the questions of law arising upon this report; the plaintiffs to become nonsuit, or the case to stand for trial as the full court should determine.

G. F. Hoar & T. L. Nelson, for the plaintiffs. 1. The St. of 1867, *c.* 339, provides that "each railroad corporation within the Commonwealth shall give to all persons or companies reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon any railroad owned or

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operated by such corporation." The great increase of manufacturing and of means of transportation by river and railroad has caused an active competition in business, which has compelled the manufacturer to send his agents with his goods directly to the local wholesale or retail dealer. These agents, known as commercial travellers, go over the country with their goods or their samples, and have effected a great revolution in domestic commerce. Sales of many of our most important manufactured articles are made largely, of some of them exclusively, by this class of persons. It has been estimated that one hundred thousand persons are so engaged in the country to-day; that the income received by the railroads from this class of travel alone amounts to thirty million dollars annually; and that every pound of a traveller's baggage is sure of inducing orders for a thousand pounds of freight to the railroad over which the baggage is carried. In obeying the statute to make reasonable provision for the transport of this class of agents "and their merchandise and other property," the railroads may, if they choose, make proper regulation, requiring the payment of increased fares, or special notice, in the case of a traveller carrying with him merchandise of extraordinary value. But they are not at liberty to refuse to transport such merchandise by passenger trains, as passengers' baggage is commonly carried. The traveller must go by the fast trains. His case of merchandise must be with him up to the moment of his departure, and must be delivered to him in person at the moment of arrival. All this is inconsistent with the conveyance of the sample trunk from one freight station to another on trains which move slowly and arrive at different hours from the passenger trains. It would be equally against the interest of the railroad to be compelled to guard such property on its freight trains, to deposit it and keep it secure in freight houses, and be obliged to retain it after arrival. A railroad which should refuse to take by a freight train the drover's servants to accompany his live cattle would be indictable under the St. of 1867; so a railroad, which should refuse to take, as baggage upon a passenger train, the trunk of a commercial traveller containing merchandise, would be indictable. This court has frequently taken notice of "new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of

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society in the advancement of civilization may require," and has found the principles of the law which it administers sufficiently comprehensive to adapt themselves thereto. *Commonwealth* v. *Temple*, 14 Gray, 69. See also *Goodwin* v. *Robarts*, L. R. 10 Ex. 337, 346.

2. In the case at bar, the jury would be authorized to find that a corporation, bound by law to furnish reasonable and equal facilities to the plaintiffs for the transportation of their agents and merchandise from Worcester to Hartford, largely engaged in the business of transporting by passenger trains the agents of merchants and manufacturers with their trunks containing merchandise, for the price of the ticket without extra charge, and having, so far as appears, no other arrangement for such transport, sold a ticket to the plaintiffs' agent and received without objection a trunk under engagement to transport it to Hartford and deliver it there to the agent, the trunk so received being known to its servants to be a sample trunk, heavily bound and clamped with iron and specially constructed for the protection of contents of extraordinary value, in a mode in which alone trunks made for the purpose of transporting merchandise are made, of a kind used solely for the purpose of transporting merchandise, known to be with its contents of much greater weight than any trunk of that size filled with apparel would be, through its own negligence failed to deliver it to the person authorized to receive it, and, by a mistake for which it was in fault, carried the trunk to a wrong place, and there delivered it to a person not authorized to receive it, whereby its contents were lost.

Whether the appearance and weight of the trunk would convey to a person familiar with baggage information that it contained something other than personal apparel, is purely a question of fact, in determining which the jury might avail themselves of their experience as practical men. There are abundant instances of packages of such form and material as convey the knowledge of their contents, without words, to men of ordinary experience; e. g. a jewelry box, a gun case, a champagne basket, a box of white lead. The trunk weighed with its contents one hundred and thirty-five pounds. The jury had the right to believe from common experience that the heaviest class

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of trunks of that size ever used for the purpose of transporting wearing apparel, and made of zinc or heavy sole-leather, would weigh but about forty pounds, and if stuffed with the heaviest kind of clothing would weigh about twenty-five or thirty pounds more. They had a right to believe that the experienced servant of the defendant, on lifting a trunk of this peculiar construction, which he knew was of a kind which bore a name implying its design for conveying merchandise, and finding that it weighed twice as much as any common passenger's trunk of the size he ever lifted, had the information conveyed to him that it was not the traveller's clothing he was receiving. The jury therefore should have been permitted to find that the defendant received the trunk with knowledge of its contents, or at least without any fraud or misrepresentation on the plaintiff's part, and undertook to transport it with all the information about it which it saw fit to require.

3. The evidence does not warrant the court in holding, as matter of law, that the contract was that of passenger and carrier only. There is nothing illegal in itself in a contract to transport a manufacturer's agent with his trunk of merchandise by a passenger train. There is nothing to prevent the defendant from engaging in the general business of such transportation and fixing the terms and price for the same and giving such passengers a ticket as the evidence of their right to be so transported with their wares. A ticket is not an instrument like a bill of exchange or promissory note, knowledge of the hidden meaning of which is lodged exclusively in the bosom of the sages of the law, or which depends for its interpretation on commercial usages so ancient, uniform and well known that the court will take notice of them without proof. Carriage by railroad is less than fifty years old. Within that period, it has effected total changes in the habits, wants and business of the community, and has itself undergone changes equally great. These changes are in constant operation. While they do not authorize the court to enact new rules of law, they do very seriously affect its right to take notice, without proof, of the habits and customs of this business as facts so well known as to require no proof; and especially to shut out proof of such habits and customs as are opposed to its own knowledge. What are the legal obligations resting upon a common carrier who has simply engaged to transport a pas-

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senger, is a question of law; whether a carrier made that simple engagement or some other in a particular instance, or whether the course of that carrier's business is confined to such simple engagements, or includes an obligation to provide other conveniences and perform other duties for the passenger, as evidence of which obligation he issues tickets or checks, is a question of fact. The check is certainly as strong evidence of an obligation to convey the article to which its duplicate is attached, as the ticket is to convey the passenger to whom it is sold. Even if there were no evidence of the baggage-master's knowledge of the general nature of the contents of the parcel, upon what principle can the assertion be supported, as a proposition of law, that "a traveller, who with a passenger's ticket presents to a baggage-master a trunk such as is commonly used for the transportation of apparel, represents, by implication, that it contains only such articles as are necessary for his comfort and convenience on the journey, and, if in fact it contain merchandise, the traveller is guilty of fraud"? Where a railroad receives goods as a common carrier of merchandise, or undertakes as a common carrier of passengers to transport the passenger and his luggage, the law doubtless determines the extent and condition of its responsibility, and the corresponding obligations of the consignor or passenger. But whether that relation was undertaken at all, or whether it was modified by special agreement, or by the establishment by the carrier of a general and different course of business, is surely a question of fact.

4. The baggage-master had authority to bind the defendant by his acceptance for transport of valuable merchandise. The carrier who, without fraud practised upon him, accepts in the course of his business valuable merchandise for transport, without inquiry as to its value, is liable for failure to keep it safely and deliver it. This is especially true where he so accepts it under circumstances from which his knowledge of its character may be inferred. *Pemberton Co.* v. *New York Central Railroad*, 104 Mass. 144. *Michigan Central Railroad* v. *Carrow*, 73 Ill. 348. *Belfast & Ballymena Railway* v. *Keys*, 9 H. L. Cas. 556. *Great Northern Railway* v. *Shepherd*, 8 Exch. 30. *Macrow* v. *Great Western Railway*, L. R. 6 Q. B. 612.

5. If not liable as carrier, the defendant is liable as bailee for

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loss of property which it has undertaken to keep. If a mere gratuitous bailee, it is liable if the property is destroyed in consequence of gross neglect to keep it safely, as for instance the act of carrying it to New York, where it had no right to convey it, and there delivering it to a person having no title to receive it, whether the same be gross or ordinary. By the Massachusetts cases, the contract of the carrier of passengers with the ordinary passenger is to carry him and such personal luggage as is reasonable for his comfort and convenience on the journey, including reasonable apparel and a reasonable sum of money for his expenses. This must be his own money and apparel, and not another's. *Dunlap* v. *International Steamboat Co.* 98 Mass. 371. *Jordan* v. *Fall River Railroad*, 5 Cush. 69. *Collins* v. *Boston & Maine Railroad*, 10 Cush. 506. *Stimson* v. *Connecticut River Railroad*, 98 Mass. 83. But, in the absence of fraud, the passenger is not bound to disclose the contents of a parcel unless the carrier ask him. If he take it as carrier without inquiry, he is liable as carrier for its safety. If he take it not as carrier, he is liable on the principles which govern such bailments. These cases fully support the principle for which we contend. If, in the common business of conveying passengers with their personal luggage, the offer of a trunk or valise commonly used for conveying such luggage is equivalent to a representation that it contains that only, then, in the business of conveying merchants and manufacturers' agents with their merchandise, an offer for carriage of a trunk commonly used for conveying merchandise only amounts to a representation that it contains that only.

A gratuitous bailee is liable for the loss of property by reason of acts which would render him liable if he were not bailee at all. We do not charge the defendant simply with neglecting to care for the safety of this property. We contend that it is liable for conveying the trunk to New York without right, and there delivering it to a person not entitled to receive it. It was induced to do this by its own carelessness, and whether gross or ordinary is not material. *Ellis* v. *Turner*, 8 T. R. 531. *Garnett* v. *Willan*, 5 B. & Ald. 53. *Martin* v. *Great Indian Peninsular Railway*, L. R. 3 Ex. 9. *Sleat* v. *Fagg*, 5 B. & Ald. 342. *Batson* v. *Donovan*, 4 B. & Ald. 21. *Bodenham* v. *Bennett*, 4 Price, 31. *Brooke* v. *Pickwick*, 4 Bing. 218. *Davis* v. *Garrett*,

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6 Bing. 716. *Wyld* v. *Pickford*, 8 M. & W. 443. *Duff* v. *Buda*, 3 Brod. & Bing. 177.

F. P. Goulding, for the defendant.

MORTON, J. This case cannot be distinguished from *Stimson* v. *Connecticut River Railroad*, 98 Mass. 83. The only contract which the defendant had entered into in relation to the property which is the subject of this suit, was a contract with Kerr, the plaintiffs' agent. This was a personal contract with Kerr for the safe transportation of himself and his personal baggage over the railroad. There was no evidence whatever of any contract by which the defendant agreed to receive and transport Kerr's trunk as merchandise.

Upon the contract implied by the sale of a ticket to Kerr, the plaintiffs can maintain no action, and Kerr could not recover for the loss of the jewelry contained in his trunk. *Jordan* v. *Fall River Railroad*, 5 Cush. 69. *Collins* v. *Boston & Maine Railroad*, 10 Cush. 506.

There was no evidence which would justify a verdict for the plaintiffs upon the counts in tort. It appeared at the trial that Kerr bought of the defendant, in Boston, a ticket for New York by way of Worcester and Springfield. He stopped over a train at Worcester. In the afternoon he delivered the trunk to the baggage-master of the defendant at the station in Worcester, asking him to check the trunk through to Hartford. He gave no notice that it contained valuable property other than personal baggage, and did not ask the defendant's agent to receive and transport it as merchandise. The agent received and checked it, in the usual course of business, as the baggage of a passenger.

The defendant thus received it under the contract implied in the sale of a ticket that it would safely transport the passenger and his proper personal baggage. The plaintiffs contend that the jury might find that the defendant's agent knew from the appearance of the trunk that it was the trunk of a person "known as a commercial traveller," and contained merchandise. There was no evidence that he knew this. The most that the evidence shows is, that he may have suspected from the appearance of the trunk that it contained merchandise other than baggage. But this fact would not affect the rights of the parties. Kerr offered and delivered the trunk as his personal baggage; he thus repre-

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sented by implication that it contained no property not included within that class or description.

The carrier was justified in receiving the trunk as baggage, under this representation, although he doubted its truth, and the only liability he would assume would be the liability which would attach if it were true. Under such circumstances, the carrier, if liable at all for property other than baggage thus put into his custody, with a fraudulent concealment of its character and value, is only liable for gross negligence or fraud, of which there is no evidence in this case. *Dunlap* v. *International Steamboat Co.* 98 Mass. 371.

The plaintiffs offered to show "that a large part of the defendant's business consisted in transporting a large class of passengers known as commercial travellers, with trunks like this, containing merchandise of great value, and that these trunks are known as sample or merchandise trunks, and are of special construction, and in the course of that business the commercial travellers purchase tickets for the ordinary passenger trains and receive checks for their said trunks, and the defendant undertakes to transport the traveller and trunk accordingly for the price of the ticket." The court properly rejected this evidence. The same evidence in substance was offered and rejected in *Stimson* v. *Connecticut River Railroad*, above cited.

It would undoubtedly be competent for a railroad corporation to agree to transport, at its risk, merchandise by a passenger train for the price of the ticket sold to the passenger. And if the defendant had made such an agreement specially with Kerr, or if it had by notice or otherwise made a general agreement that commercial travellers might carry merchandise upon passenger trains at its risk, it might be liable in this action. But the offer of proof does not go far enough to show such an agreement.

The fact that commercial travellers or others are accustomed to carry merchandise in passenger trains without paying any more than the usual price of a ticket for a passenger, even if known to the carriers, will not render them liable for such merchandise. The travellers carry such merchandise at their own risk. The established rule of law which limits the responsibility of the carrier, upon the contract implied by the sale of a ticket to a passenger to the proper personal baggage of such passenger,

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cannot be annulled, and the liability of the carrier enlarged, without proof of an agreement to that effect entered into by the carrier.

For these reasons, we are of opinion that, upon the evidence in this case, the jury would not be justified in finding the defendant liable either in contract or tort. *Plaintiffs nonsuit*

HENRY A. SKINNER *vs.* WALTER A. BRIGHAM.

Worcester. Oct. 1, 1878. — Jan. 28, 1879. AMES & SOULE, JJ., absent

If a person, by false and fraudulent representations, induces another to exchange certain chattels for a parcel of land, of which he delivers an invalid deed, the grantee can recover for the conversion of the chattels; and the deed is admissible in evidence, without proving its execution by the attesting witness.

TORT. The declaration contained two counts. The first count alleged that the defendant, for the purpose of inducing the plaintiff to purchase a certain parcel of land in Enfield, New Hampshire, falsely, fraudulently and with intent to cheat and defraud the plaintiff, represented to him that there was a barn on the estate one hundred feet in length, a two-story house nearly new and painted white, and one small house, that both houses were occupied by families at that time, and that the estate was only three and one half miles from the Enfield depot; that the plaintiff, believing these representations, was thereby induced to purchase the estate, and in part payment therefor to deliver to the defendant certain machinery and personal property of the value of $500; and that the representations were false, to the knowledge of the defendant, whereby the plaintiff suffered great damage. The second count was for the conversion by the defendant of the personal property mentioned in the first count. Answer, a general denial.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff offered evidence tending to prove the facts alleged in the first count of the declaration; that the defendant, in pursuance of the agreement between him and the plaintiff, in regard to the sale and purchase of the estate, having in his possession

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a blank form of deed apparently signed, sealed and witnessed by persons residing in New Hampshire, containing in the granting part a description of the estate, the name of the grantee and date being blank, filled in the name of the plaintiff as grantee and delivered the paper to him; that the plaintiff said to the defendant, at the time, that he thought the latter should sign the deed; that the defendant replied that it was all right, that by delivering that deed he would avoid the expense of another; that the plaintiff then delivered the personal property to the defendant; that after said property was thus delivered, the defendant, at the plaintiff's request, filled in the date of the instrument; that as soon as the plaintiff found that the representations made by the defendant were false, he went to the latter and told him that the estate was not what he had represented, and then tendered back to the defendant the instrument received of him and also a quitclaim deed from himself to the defendant of the premises in question, and demanded back the personal property, which the defendant refused to deliver. The plaintiff testified that he received the instrument as and for the deed of the premises which he agreed to purchase, supposing it to be a valid deed; and the defendant testified that he delivered the deed as a valid deed in exchange for the personal property.

The plaintiff offered the instrument in evidence, but offered no evidence of its execution by the grantors. He testified that he did not know the witnesses, or where they resided. He also called the defendant, who testified that he did not know the grantors or witnesses and had no authority from them to fill up the instrument. The defendant objected to the admission of the instrument in evidence, but the judge admitted it as the paper which was delivered by the defendant as the title to the real estate, and the defendant excepted.

At the close of the evidence, the defendant asked the judge to direct a verdict for the defendant, on the ground that the evidence would not support a verdict for the plaintiff on either count; and also asked the judge to rule as follows: "Inasmuch as the plaintiff, by the transaction between him and the defendant, got no title to the farm in question, the alleged representations as to its character and quality are immaterial, and therefore the plaintiff cannot recover upon the count for deceit."

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The judge declined so to rule; submitted the case to the jury, on the first count, under instructions not excepted to; and, in reference to the deed, instructed the jury that it was immaterial whether the deed was valid or not, if they found that the plaintiff agreed to buy and the defendant agreed to sell the estate in question, and the plaintiff paid the consideration agreed upon, and the defendant delivered to him this deed as and for a valid deed of the premises, and it was so represented to be by him, and the plaintiff received it as such, and if they further found that the bargain was made and the property delivered by the plaintiff induced by the false and fraudulent representations of the defendant.

The jury returned a verdict for the plaintiff for the value of the personal property, he not claiming any more; and the defendant alleged exceptions.

F. P. Goulding, for the defendant.

F. T. Blackmer, for the plaintiff.

ENDICOTT, J. Upon the undisputed facts, the jury were bound to find that the defendant, as alleged in the second count, converted to his own use the chattels delivered to him by the plaintiff, as the consideration for the conveyance of the farm, which was never conveyed to the plaintiff by a valid and sufficient deed. See *Burns* v. *Lynde*, 6 Allen, 305. The consideration therefore utterly failed. The deed was properly admitted in evidence as part of the transaction, and the plaintiff was entitled to recover the value of the chattels which he had delivered as his part of the bargain. The plaintiff having recovered no more than their value, the defendant was in no way injured by any of the instructions; and it is unnecessary to consider whether they were in all respects accurate.

Exceptions overruled.

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EDWARD D. PETERS, JR. *vs.* CHARLES SIDERS.

Plymouth. Oct. 15, 1878.—Jan. 4, 1879. AMES, ENDICOTT & SOULE, JJ., absent.

Evidence that a testatrix, who, by a will dated nine months after marriage, devised all her estate to her husband, had by an antenuptial agreement reserved to her sole use certain real estate and the right to dispose of it by will, and that she had a child born a month after the will was made, will justify a finding that her omission to provide in her will for the child was intentional, and not occasioned by accident or mistake, under the Gen. Sts. c. 92, § 25.

WRIT OF ENTRY, dated September 8, 1877, to recover a parcel of land in Hingham. Plea, *nul disseisin*. At the trial in this court, before *Soule*, J., without a jury, the following facts appeared:

The parents of the demandant, Henry H. Peters and Susan B. Thaxter, were married on July 12, 1848, having made, six days before, an antenuptial agreement, by which Susan reserved to her sole use and benefit an undivided third part of certain lands, including the demanded premises, and also the right to dispose of the same by will. The demandant, who was the only issue of the marriage, and sole heir-at-law of his mother, was born on June 1, 1849. His mother died on July 21, 1849, at the age of twenty-two years, leaving a will dated April 30, 1849, and duly proved and allowed on October 13, 1849, by which she gave all her real and personal property of which she should die possessed, including that reserved by the antenuptial agreement, to her husband.

On July 3, 1849, on petition of the demandant's parents and other heirs of Edward Thaxter, the Probate Court ordered that partition be made of the real estate of Edward Thaxter, including the demanded premises, of which the demandant's mother and her sister were each then seised and possessed, in her own right, of one undivided third part, the other third part being then owned by their brother, Edward T. Thaxter, who had notice of said petition, and by his guardian waived objection thereto. Commissioners were appointed, who, on January 28, 1850, made return to the Probate Court of their proceedings, reciting the death of the demandant's mother, and her will, and thereupon assigned to her husband, his heirs and assigns, the whole of the demanded

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premises, with others, reciting also that the demandant's mother had "devised all her right, title and interest in said real estate to her husband, his heirs and assigns." The partition was accepted and confirmed by the Probate Court on January 30, 1850. The demandant's father, claiming under the will and proceedings in partition, conveyed all the demanded premises to the tenant, in two parcels, by deeds dated May 20, 1864, and July 3, 1868, and died in 1877. The tenant has been in possession of the demanded premises since those dates, claiming title thereto.

The demandant asked the judge to rule as follows: "1. There is no sufficient evidence that the omission to provide for the plaintiff in the will of his mother was intentional; and, as it is not contended that he was provided for by the testatrix, in her lifetime, he is entitled to judgment under the Gen. Sts. *c.* 92, § 25. 2. There is no evidence in the case sufficient to overcome the presumption of said statute. 3. The plaintiff, upon the evidence, is entitled, not merely to an undivided third part, but to the whole of the premises."

The judge refused so to rule; found as a fact that the omission of the testatrix to provide for the demandant in her will was intentional, and not occasioned by accident or mistake; and reported the case for the consideration of the full court.

If the court should be of opinion that there was no evidence which would warrant a finding that the omission to provide for the demandant was intentional, judgment was to be entered for him for the whole of the demanded premises, or for such part thereof as it should appear he was entitled to; otherwise, judgment was to be entered for the tenant.

J. R. Churchill, for the demandant. 1. The burden of proving the testatrix's intent to omit, and the absence of accident and mistake, is upon the tenant. The presumption is in favor of the demandant. Gen. Sts. *c.* 92, § 25. *Ramsdill* v. *Wentworth*, 106 Mass. 320. The evidence discloses simply those facts which must exist before this presumption can be raised or the statute have any application, namely, the existence of a child, his parent's will, and the total omission therein to provide for the child. The finding of intent to omit, upon such facts, is unwarranted. *Bancroft* v. *Ives*, 3 Gray, 367. If this finding is sus-

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tained, mere knowledge on the part of a testator of the existence of his child is sufficient to overthrow the presumption raised by the statute; and the operation of the statute is practically restricted to the case of children whose existence is unknown until after the making of the will. Yet the statute has been applied to children born before, as well as to those born after, the making of the will; and conceding that, upon principles of human nature, it is always a fair presumption that a testator knows of the existence of his child when he makes his will, yet this natural presumption, unaided by other evidence, has not availed in those cases, and ought not to overthrow a statutory presumption. *Ramsdill* v. *Wentworth*, 101 Mass. 125, and 106 Mass. 320. *Tucker* v. *Boston*, 18 Pick. 162.

2. The evidence is to be viewed and construed in the light of the statute, which assumes and presumes that a testator not only may, but does, forget his omitted child, though then in existence; and conceding again, on natural principles, that it is incredible that a mother should forget her child in making her will, yet this is precisely what the statute contemplates as credible, and to be presumed, notwithstanding a contrary presumption or inference which might be reasonable enough except for the statute. A statutory presumption arising in view of certain given facts ought not to be overthrown by an inference from the same facts which would be reasonable in the absence of the statute. Stark. Ev. (8th Am. ed.) 818. *Bancroft* v. *Ives*, 3 Gray, 367. *Snow* v. *Warner*, 10 Met. 132. *Denny* v. *Williams*, 5 Allen, 1. *Chase* v. *Breed*, 5 Gray, 440.

3. The case is distinguishable from *Buckley* v. *Gerard*, 123 Mass. 8. There is here no evidence that the father "was acute and shrewd and able and familiar with business;" that the mother "was a woman of great intelligence and capacity;" and there is no evidence of her affection for or confidence in her husband, of his devotion to her, and, of course, no evidence of affection for the unborn child.

A. French, (*E. Ames* with him,) for the tenant.

COLT, J. The mother of the demandant, who died July 21, 1849, executed her will April 30 of the same year, by which she gave all the real and personal property of which she might die possessed to her husband. Before her marriage, she had exe

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cuted an antenuptial contract by which she secured the demanded premises to her sole use and benefit, with the right to dispose of the same by will. The demandant, who was her sole heir at law, and the only issue of the marriage, was born within about one month after the will was executed, and there was an entire omission to provide for him therein.

The demandant contends that, under the provisions of the Gen. Sts. *c.* 92, § 25, he takes the same share of his mother's estate as he would have been entitled to if she had died intestate. This depends on whether the omission was intentional, and not occasioned by accident or mistake. That was the only question before the court.

The case was tried by a justice of this court, without a jury, and he found as a fact, that the omission was intentional, and not occasioned by accident or mistake. In the opinion of the court, there was evidence sufficient to warrant his finding.

The omission may be shown to be intentional, either by the terms of the will, or by extrinsic parol evidence. *Wilson* v. *Fosket*, 6 Met. 400. There is nothing in this will, except the fact of the omission, which indicates a purpose not to provide for her son. But the relation of the testatrix to the objects of her bounty and to the child for whom provision is omitted, as well as her intelligence, and the circumstances under which the will is made, are all proper matters for consideration. *Buckley* v. *Gerard*, 123 Mass. 8. The judge might well find that the fact that the testatrix was so soon to be delivered of her first child must have been in her mind when the will was made, and could not have been forgotten. There is no suggestion of any mistake of fact or law, or any ignorance on the part of the testatrix, or any oversight of the scribe, as the cause of the omission. The making of the will at that time warrants a presumption that it was made in anticipation of her confinement, and with a purpose that, if the event should prove fatal, her property should go to him on whom would devolve the care and support of the child. *Ramsdill* v. *Wentworth*, 101 Mass. 125.

By the terms of the report, the entry must be

Judgment for the tenant.

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WILLARD E. TALBOT *vs.* A. H. HEATH.

Plymouth. Oct. 15, 1878. — Jan. 4, 1879. AMES, ENDICOTT & SOULE, JJ., absent.

An agreement between A. and B., by which A. is to take charge of B.'s brick-yard, and to have the brick made "in the best manner and at the lowest cost possible, and to attend to and watch over the interests of the work, as a skilful owner would do for himself," is not a guaranty that the bricks shall be made in the best manner and at the least possible cost, without regard to the kind of materials and machinery furnished by B.

CONTRACT for services rendered under a written agreement. Answer, failure to perform the terms of the agreement, whereby the defendant sustained loss. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

H. Kingman, (*A. Lord* with him,) for the defendant.

W. H. Osborne, for the plaintiff.

COLT, J. The plaintiff agreed in writing to take charge of the defendant's brick-yard, for the purpose of superintending the improvements to be made, and of making brick, during the season of 1877. He agreed, in the words of the contract, to "have the brick made and burned in the best manner, and at the lowest cost possible," and to "attend to and watch over all the interests of the work, manufacture and property, the same as would a careful, skilful, prudent owner for himself."

It appears that, before the contract was made, the defendant went to see the plaintiff in New Hampshire, where he then resided and carried on business as a skilful brickmaker, and there made inquiries as to the methods employed by the plaintiff in making brick; that, after a conference with the plaintiff himself as to the best and cheapest way, the contract in question was made, and the plaintiff came to East Bridgewater and performed the service for which he seeks compensation. It further appears, that the failure to make good brick was caused by the attempt to make them by mixing coal-dust with the clay, in order to reduce the cost of making; and that both parties understood that this mode was to be adopted under the contract.

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The judge was asked to rule, that the defendant was entitled to a verdict, unless the jury should be satisfied that the plaintiff caused the brick to be made and burned in the best manner and at the lowest possible cost. But the judge refused, and instructed the jury, in substance, that the plaintiff was required to superintend the work undertaken, with that attention and watchfulness in the employment and labor of competent men, and their use of the machinery and materials provided by the defendant, which an owner of such machinery and materials, having skill, care and prudence in the business of brickmaking, would himself use, for the purpose of having bricks made and burned, in the best manner, and at the lowest cost, reasonably practicable.

The instruction requested was properly refused. The plaintiff's contract was a contract of personal service; he had nothing to do with furnishing machinery, tools or material. He was to superintend the work. The instruction refused is founded on an interpretation of the contract, which would make it a guaranty on the part of the plaintiff that the bricks should be made by him in the best manner, and at the lowest cost possible, although the difficulty in making them might be wholly due to the character of the clay or other material used, or the imperfection of the tools and machinery furnished by the defendant. But the promise to make them in the best manner, and at the lowest cost, if understood, when the contract was made, as a guaranty, would not have been immediately followed in the same sentence by a clause furnishing, as a measure of the attention and skill required of the plaintiff, the degree of attention and skill which a prudent owner would bestow. Upon the defendant's theory, this last clause was wholly unnecessary. The contract as applied to the subject-matter and the existing relations of the parties was correctly interpreted in the instructions given to the jury on this point.

Exceptions overruled.

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HARRIET R. PORTER *vs.* RUFUS P. KINGMAN & another.

Plymouth. October 15, 1878. — January 4, 1879.

A person who has purchased an estate subject to a mortgage given by a former owner to a bank, cannot maintain a bill in equity against the receivers of the bank to procure a cancellation of the mortgage, on the ground that it was obtained by the false and fraudulent representations of the bank, but, if he has any remedy in equity, must proceed by a petition in the cause in which the receivers were appointed.

BILL IN EQUITY, filed July 17, 1878, alleging that on July 15, 1871, Lewis Porter and George Southworth executed and delivered to the North Bridgewater Savings Bank their promissory note for $7,445.56, secured by a mortgage of land in Brockton; that in 1875 Porter and Southworth were adjudged bankrupts, and in the same year their assignees conveyed the land to a third person, who conveyed it to the plaintiff; that the mortgage to the bank was given without consideration and under a mistake of fact, and was procured through the false and fraudulent representations of the treasurer of the bank; that the defendants had been appointed by this court receivers of the bank, and as such hold the mortgage and note, demand payment of the note, and threaten to foreclose the mortgage; and that the plaintiff, before knowledge of the fraud, had paid to the bank and to the receivers large sums of money as interest.

The prayer of the bill was, that the note and mortgage should be delivered up to the plaintiff to be cancelled; that an account be taken of the amount paid the bank and the receivers, and that the defendants be ordered to pay the same; for an injunction to restrain the defendants from proceeding to collect the note and to foreclose the mortgage; and for further relief.

The defendants demurred to the bill, assigning, among other grounds of demurrer, that the plaintiff's remedy was only by petition in equity in the cause in which the defendants were appointed receivers; and that the plaintiff had a plain, adequate and complete remedy at law.

E. Ames, for the defendants.

R. M. Morse, Jr. & R. Stone, Jr., for the plaintiff.

SOULE, J. If we assume that the allegations of the bill make

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a case for relief in equity, the question remains whether the plaintiff can maintain this bill, or must pursue her remedy by petition in the suit in which the defendants were appointed receivers of the property of the corporation, which is named as payee of the note and grantee in the mortgage. On the face of the papers, the corporation had a legal title to both instruments, and it was the duty of the defendants, under the order appointing them, to take possession of both. If the plaintiff has any equitable ground for insisting that the mortgage ought not to be enforced against her title to the land, such right must be made known to the court by a petition in the cause in which the defendants were appointed receivers. The property is in the custody of the court, and the defendants in holding it are officers of the court. Equitable rights which it is contended are superior to the title made by order of the court can be passed upon only in the cause in which that title is created, and cannot be set up in an independent suit. *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480. *Columbian Book Co.* v. *De Golyer*, 115 Mass. 67. *Wiswall* v. *Sampson*, 14 How. 52. *Noe* v. *Gibson*, 7 Paige, 513. *Robinson* v. *Atlantic & Great Western Railway*, 66 Penn. St. 160. *Russell* v. *East Anglian Railway*, 3 Macn. & Gord. 104. 2 Dan. Ch. Pract. 1743. This well settled doctrine is entirely consistent with the decision in *Hills* v. *Parker*, 111 Mass. 508, and was recognized by the court in the opinion; but the plaintiff was permitted to maintain his action of replevin against the receivers of the Boston, Hartford and Erie Railroad Company, because the chattels in controversy had never been the property of that corporation, and therefore were not in their hands as receivers, and not in the custody of the court.

The demurrer is for this reason well taken; and the bill must be dismissed.

We express no opinion on the other question presented by the demurrer, the question whether the bill shows any equitable right in the purchaser of an equity of redemption from an assignee in bankruptcy to have a mortgage cancelled as having been obtained by fraud from the bankrupt. It will be time enough to pass upon that question when it is properly before us.

Bill dismissed, without prejudice

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CHARLES G. DAVIS *vs.* JAMES C. MURPHY.

Plymouth. Oct. 15, 1878. — Jan. 7, 1879. AMES, ENDICOTT & SOULE, JJ., absent.

A tenant at will, under an agreement that he is at liberty to leave the premises at pleasure and at a moment's notice, is not liable for rent after he has given such notice, and is not obliged to give the notice mentioned in the Gen. Sts. c. 90, § 31.

CONTRACT on an account annexed for use and occupation of a tenement in Plymouth, from September 1, 1877, to December 1, 1877, at the rate of $20 a month. The answer admitted that the defendant owed the plaintiff for the use and occupation from September 1, 1877, to October 8, 1877, at the rate of $5 a week, alleged a tender of the amount, and set up that the tenancy was by an oral agreement, by the terms of which the defendant was to pay $5 a week so long as he should occupy the tenement, and that the defendant could quit the same at any time, without giving the notice required by the statute.

At the trial in the Superior Court, before *Brigham*, C. J., the plaintiff introduced evidence tending to prove that the defendant hired the tenement in question for an indefinite period, at the rate of $20 a month; that he entered upon its occupation on September 1, 1877; and that he left the same on October 8, 1877, without giving notice of an intention to quit, and never afterwards occupied it.

There was evidence on the part of the defendant that he hired the tenement of the plaintiff at the rate of $5 per week, with liberty to leave it at pleasure, and at a moment's notice, in consideration of his agreement to vacate it whenever the plaintiff should let the whole house, of which the tenement was a part; that, under this agreement, the defendant left the tenement when it served his convenience to do so, without previous notice to the plaintiff; that after leaving, and on the same day, he sent the plaintiff the following letter: "Bearer will hand you keys of house. If you insist on a week's notice, you can send me bill of rent up to next Saturday, and I shall send you a check for amount;" and that on October 9 he also sent the plaintiff the following letter: "I enclose check for full amount of rent up to yesterday, the time I vacated premises, being a term of five

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weeks and two days, which, at the rate of five dollars per week, will make $26.43, if I mistake not."

The only witnesses at the trial were the plaintiff and the defendant, excepting a witness called by the defendant, who testified that the plaintiff agreed to receive $5 per week rent.

The judge ruled that, upon these facts, the plaintiff was entitled to notice from the defendant, as provided by the Gen. Sts. *c.* 90, § 31, in relation to the determination of estates at will; and directed the jury to return a verdict for the plaintiff for the whole amount claimed. The defendant alleged exceptions.

A. Mason, for the defendant.

C. G. Davis, pro se.

MORTON, J. The statute provides that "estates at will may be determined by either party, by three months' notice in writing for that purpose given to the other party; and when the rent reserved is payable at periods of less than three months, the time of such notice shall be sufficient if it is equal to the interval between the days of payment." Gen. Sts. *c.* 90, § 31.

This statute provides a mode in which, in the absence of any agreement of the parties, estates at will may be determined, but it does not provide that they may not be determined in any other mode. Thus, if a tenancy at will is for a definite period, as for a year or a month, it is determined by its own limitation, without any notice. So also it is familiar law that, if the lessor alienates his estate by a deed or a written lease, this terminates the tenancy, and the lessee is not entitled to the statute notice.

In *Farson* v. *Goodale*, 8 Allen, 202, there was evidence that the defendant, who was a tenant at will, left the premises by the consent of the landlord, who said he should not require a written notice, and it was held that the tenancy was terminated; the court saying in the opinion, that "a tenancy at will may be terminated at any time and in any manner which may be mutually agreed upon by the parties." In *May* v. *Rice*, 108 Mass. 150, the defendant was a tenant at will under an oral lease by which the rent was payable quarterly. The parties made an oral stipulation that either party might "terminate the tenancy by giving one month's notice to the other in writing." It was held that the tenant by giving one month's notice according to the agree-

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ment terminated the tenancy. These cases are based upon the principle that the parties may agree between themselves as to the time and manner in which the tenancy may be terminated. See *Hollis* v. *Pool*, 3 Met. 350.

The plaintiff relies upon the case of *Batchelder* v. *Batchelder*, 2 Allen, 105. In that case the defendant asked the court to rule that, if "the contract between the parties was that he might quit the premises whenever he pleased, no notice of his intention to quit was necessary," which the court refused. A tenancy at will is one which may be terminated at the will or pleasure of either party. The contract relied on by the defendant went no further than to show that he was a tenant at will; it contained no stipulation as to the time or mode in which the tenancy might be terminated, and therefore the court held that the statute applied to it, and it could not, in the absence of any agreement of the parties, be terminated without notice.

That this was the view taken by the court is apparent from the fact that the opinion does not discuss or refer to the question, whether the parties might by agreement terminate a tenancy at will in a mode different from that provided by the statute, and from the further fact that within three years thereafter the court, consisting of the same judges, decided the case of *Farson* v. *Goodale*, *ubi supra*, which is inconsistent with and would overrule *Batchelder* v. *Batchelder*, if the construction which the present plaintiff puts upon that case is correct.

In the case at bar, there was evidence on the part of the defendant that the parties agreed that the defendant should have "liberty to leave the premises at pleasure and at a moment's notice." The stipulation as to notice may imply that the parties intended to substitute for the notice required by the statute an agreement that the tenancy might be terminated upon a moment's notice by the lessee. If the jury were satisfied that such was the agreement, the defendant would not be liable for rent after he had quit the premises and had given notice thereof to the plaintiff.

We are therefore of opinion that the case should have been submitted to the jury, and that the ruling directing a verdict for the plaintiff was erroneous. *Exceptions sustained.*

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SAMUEL T. SANFORD *vs.* EMELINE PIERCE & another.

Bristol. Oct. 24, 1878. — Jan. 11, 1879. ENDICOTT & LORD, JJ., absent.

The occupation of a house on mortgaged premises, by a husband and wife, the latter being the mortgagee, under an agreement between the husband and the wife's mother, who was supposed to be the owner of part of the premises, is not such a "possession of the premises" by the mortgagee, within the Gen. Sts. *c.* 140, § 15, as will entitle the mortgagor, on a bill in equity to redeem, to have the rent of the tenement applied towards the payment of the mortgage debt.

BILL IN EQUITY, filed February 13, 1877, to redeem a parcel of land in Fall River from a mortgage.

The case was referred to a master, who reported that the plaintiff owed the defendants, who are his sisters, the sum of $400 each, for which he gave his note for $800 secured by the mortgage in question; that the defendant Emeline Pierce, from the date of the mortgage, has lived with her husband in New Bedford, and has never been in the actual possession of the mortgaged premises, or of any part of it; that the other defendant, Malvina F. Wady, lived with her husband, John H. Wady, in the upper tenement of the dwelling-house on the mortgaged premises from February 11, 1871, to January 4, 1877, but carried on no separate business of her own; that at the time Mrs. Wady moved into this tenement she was induced by the plaintiff to believe that she was the legal owner of $\frac{4}{10}$ths of the mortgaged property; that she also believed that her two sisters and the plaintiff owned $\frac{4}{10}$ths each, and their mother owned $\frac{8}{10}$ths; that John H. Wady, in the presence and hearing of his wife, and with the knowledge and consent of the plaintiff, made a bargain with Charity Sanford, the mother of the plaintiff and defendants, to have this tenement by paying taxes, making repairs, and looking after the place; that Wady and his wife occupied the tenement from February 11, 1871, to April 15, 1873, believing the above facts; that on the latter date they and the defendant Pierce learned that the plaintiff was the legal owner of the mortgaged premises, and that the only interest the defendants had in the property was as mortgagees; that Wady and his wife continued to occupy the tenement until January 4, 1877, knowing the true state of the title, but no demand for

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rent was made by the plaintiff, and no new arrangement was made, the plaintiff believing that the rent was due from Mrs. Wady, and would be offset against the mortgage debt; that Charity Sanford died in December, 1871; and that John H. Wady is possessed of no property, and had none during the occupancy of the tenement; and stated the account in the alternative.

Hearing before *Ames*, J., who, by consent of parties, reserved the case for the consideration of the full court, upon the questions of law arising thereon; such decree to be entered as law and justice should require.

J. M. Morton, Jr., for the plaintiff.

E. H. Bennett, for the defendants.

AMES, J. In the view which we have taken of the facts of this case, as reported by the master, it has become unnecessary to pass upon the question whether the title of the defendants in the mortgaged premises was that of joint tenants or tenants in common. Whatever may have been their relative position in that respect, we do not find, upon the master's report, that the mortgagees have had such a possession of the mortgaged premises, either separately or jointly, as to render them or either of them chargeable for rents and profits. As to one of them, it is conceded that she has never been in actual possession of the mortgaged property, or any part of it. The other, Malvina F. Wady, lived for a number of years in an upper tenement of the dwelling-house, with her husband, John H. Wady, but this occupation was under a contract between her husband and her mother, who was supposed to be the owner of about two undivided third parts of the entire property. Mrs. Wady did not hire the tenement, and made no contract whatever in relation to it. The occupation was her husband's occupation, and her husband was the tenant. There is nothing in the facts reported from which any implied contract on her part can be inferred, under which she became the tenant or liable to pay rent. It is immaterial that when this occupation begun she was under the mistaken impression that she was the owner of a small undivided fractional interest in the property, especially as that mistake was one into which she was led by the plaintiff. There is nothing to indicate any agreement on her part that the rent for

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which her husband was chargeable should be applied towards the mortgage debt due from the plaintiff.

The decree, therefore, must be that the plaintiff may redeem on payment of the principal and interest of the note, without any allowance for rents and profits; and that the defendants recover their costs. *Decree accordingly.*

EDWARD KELLEY *vs.* BORDER CITY MILLS.

Bristol. Oct. 25, 1878.—Jan. 17, 1879. ENDICOTT & LORD, JJ., absent.

A boiler, situated in a building joined to a mill, and used to supply steam to the mill, is a part of the realty, and for repairs on the boiler a lien can be maintained under the Gen. Sts. *c.* 150; and the whole of the land, on which the mill and the building, in which the boiler is, are situated, may properly be included in the description of the premises on which the lien is claimed.

PETITION, under the Gen. Sts. *c.* 150, to the Superior Court, dated May 6, 1878, to enforce a mechanic's lien, alleging that the petitioner made a verbal contract with James E. Cunneen of Fall River, concerning the building on the premises hereinafter described, to "take apart, repair and put together again such defective boilers and piping as were on the premises," for $3.50 a day; that the petitioner, at the special instance and request of said James E. Cunneen, performed upon said building the labor mentioned in the account annexed, and that James E. Cunneen had authority from, and was rightfully acting for, the Border City Mills, a corporation in Fall River, it being the owner of the premises, and with its consent; that under and by virtue of said contract he performed the labor mentioned in the account annexed, "in the alteration and repair of said structure upon said premises," that the premises are situated in the northerly part of Fall River, (describing them by metes and bounds,) "being the same lot of land which is occupied by Border City Mills, known as Border City Mills Number Two, and the structure upon which said labor was performed is a cotton mill situated upon said premises and recently erected thereon, and said premises at the time said contract was made, and said labor

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performed, were the property of said Border City Mills," that the petitioner ceased to perform said labor upon April 12, 1878, and within thirty days thereafter filed in the registry of deeds for the county of Bristol a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by this lien, sufficiently accurate for identification, with the name of the corporation which is the owner thereof, which statement was subscribed and sworn to by the petitioner and was in all respects duly made and recorded in accordance with the statutes of this Commonwealth; and praying that said premises might be sold, and the proceeds of sale applied to the discharge of his demand and costs. The account annexed stated the amount due at $75.25.

The certificate of lien stated that the above sum was due "for labor performed, in the alteration and repair of a building situated on a lot of land in Fall River, being the land occupied by mill known as Border City Mills Number Two;" described it by metes and bounds; and gave the time when the petitioner "ceased to labor on said building."

The case was submitted to the Superior Court upon an agreed statement of facts, in substance as follows: The petitioner was hired by James E. Cunneen, the defendant's superintendent, who was duly authorized to hire and employ the petitioner to repair two stationary steam-boilers in the boiler-house, used in connection with its cotton mill, the boiler-house being a separate building from the mill, but joining the mill on the back. The repairs consisted of putting on patches to the boilers, and riveting the same. In consequence of this contract, the petitioner did repair the boilers. The certificate of lien was duly sworn to, filed and recorded within thirty days from the time the petitioner ceased labor on the boilers. If, as matter of law, the lien, on these facts, could be maintained, the petitioner was to have judgment for $75.25; otherwise, judgment for the respondent.

Gardner, J., ordered judgment for the respondent; and the petitioner appealed to this court.

D. V. Sullivan, for the petitioner.

G. Marston & H. K. Braley, for the respondent. The certificate does not conform to the petition, and the petition does not

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conform to the certificate. The certificate claims for "labor performed in the alteration and repair of a building," and gives the time when the petitioner "ceased to labor on said building." The petition sets forth a contract to "take apart, repair and put together again such defective boilers and piping as were on the premises." A stationary steam-boiler is not a "building or structure" within the meaning of the statute. *Truesdell* v. *Gay*, 13 Gray, 311. *Lambard* v. *Pike*, 33 Maine, 141. *Collins* v. *Mott*, 45 Misso. 100. Phillips on Mechanics' Liens, § 175. No lien attaches for a fence around a house. *Hubbard* v. *Brown*, 8 Allen, 590. Nor for removing a building. *Trask* v. *Searle*, 121 Mass. 229. The boiler was separate and distinct from the boiler-house and mill, and cannot be said to have been a part of either. The petitioner claims a lien on all the land of the respondent, instead of confining his lien to the land on which the boiler-house stands. The statute gives him no claim upon any estate except that on which the building is situated. *Landers* v. *Dexter*, 106 Mass. 531.

SOULE, J. It appears from the agreed facts that the boilers which the petitioner repaired were situated in a part of the respondent's mill and used to supply steam thereto. They were, therefore, a part of the realty, and would pass, without being specified, by a deed of the land on which the mill stood, not as appurtenances, but as parcel of the land. *Winslow* v. *Merchants Ins. Co.* 4 Met. 306. *Pierce* v. *George*, 108 Mass. 78. *McConnell* v. *Blood*, 123 Mass. 47. They constituted a part of the building, and repairs on them were repairs on the building, precisely as repairs on partitions or doors or furnaces would have been. In *Turner* v. *Wentworth*, 119 Mass. 459, it was held that the petitioners were entitled to enforce a lien for furnaces and ranges furnished by them, if, by the contract, they were to be furnished as parts of the several houses in which they were put; that if it was the intention that they should be, and they were in fact, so applied as to constitute parts of the buildings, the petitioners would have a lien for them. See also *Morgan* v. *Arthurs*, 3 Watts, 140; *Gray* v. *Holdship*, 17 S. & R. 413; *Wademan* v. *Thorp*, 5 Watts, 115. In the case at bar, the boilers being a part of the realty, constituting a part of the building in which they were put, the petitioner has a lien for repairs on them, as

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he would have had a lien for putting them in. The lien is properly claimed on the whole of the lot described in the petition. The "boiler-house," being joined to the main body of the mill and used for supplying steam to it, is a part of the mill, and the statute provides that the lien shall cover the lot of land on which the building is situated. The description in the petition is confined to the lot on which Mill Number Two is situated. We are of opinion that the learned judge who tried the case in the Superior Court erred in ordering judgment for the respondent, and that there must be *Judgment for the petitioner.*

CHARLES F. DUNHAM & another *vs.* ANN E. GANNETT, administratrix.

Dukes County. Oct. 25, 1878. — Jan. 11, 1879. ENDICOTT & LORD, JJ., absent.

A bond described a bound of a way as running from a certain point, "on a straight line to the shop of A." There was evidence that at the date of the bond there was an outside platform extending along the front of A.'s shop, built at the same time with it, and resting on the same foundation. *Held*, that, if the platform was part of the building, the line ran to the corner of the platform, and that whether the platform was a permanent or a temporary part of the building was immaterial.

CONTRACT on a bond, executed to the plaintiffs by Abraham Osborn, the defendant's intestate, and conditioned to keep and cause to be kept at all times thereafter open and unobstructed, for the benefit of the plaintiffs, their heirs and assigns, a certain way in Edgartown, described as "beginning at the northeast corner of a lot of land belonging to said plaintiffs;" (thence by various courses and distances which it is unnecessary to state;) "thence in an easterly direction to the south corner of William P. Chadwick's shop; thence on a straight line to the shop of Joseph V. Kelley; then across the way aforesaid to the first bound."

After the decision reported 124 Mass. 151, the case was tried in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

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The question for the jury was whether a fence erected by Joseph V. Kelley, claimed by him to be on the line between his land, adjacent to the shop mentioned in the bond, and the way defined in the bond, was within the way and an obstruction thereof. There was evidence tending to show that at that locality an ancient way of varying width had existed for a long period prior to giving the bond, and that Osborn had included it in a warranty deed to Kelley, bounding him upon the plaintiffs' land which lay on the other side of the way; that Kelley fenced the way, resulting in a suit between him and the plaintiffs, which was adjusted by Osborn giving the bond. As to the line of the ancient way, as defined by buildings and fences on the side where Chadwick's and Kelley's shops stood, evidence was offered on both sides and was conflicting. The line called for in the bond was a straight one from the south corner of William P. Chadwick's shop to the "shop" of Joseph V. Kelley, and the principal point in dispute was whether by the term "shop" was included a platform which extended from the entire front of the shop about four feet toward the way. The shop fronted on the way, as also did Chadwick's shop on the same side. If by the term "shop" was meant only the upright main part of the building, the fence was within the line, and an obstruction of the way.

The defendant introduced evidence tending to show that the fence, which the plaintiffs claimed to be an obstruction, was erected on the straight line extending from the south corner of Chadwick's shop to the outer or southwest corner of this platform nearest the way; that Kelley's shop was built about seventy years ago in the following manner: The whole structure rested on piles driven into the ground, upon which rested certain timbers called stringers or lower sills, which were mortised into the piles. On these stringers rested the main or upper sills, into which were built and mortised all the upright walls of the building; the stringers or lower sills extended out in front toward the way beyond the upper sills about four feet, and upon them the platform was built. The building was designed and afterwards used for a cabinet-maker's shop, and the platform was built for the purpose of placing the furniture made inside, out to dry. It was about three feet high originally, but had been raised with the building to about six feet high, giving room for persons to pass

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under it into a basement room under the original building. The plaintiffs introduced no evidence as to the method of constructing the shop and platform, but the evidence was conflicting as to whether it had thus been raised before the bond was given. The jury viewed the locality and the building inside and out. The defendant's evidence tended to show that it had been so raised, and that of the plaintiffs that it had not, until several years afterwards. It had been entirely removed about five years ago. There was other and conflicting evidence as to the original location of both shops and the width of the platform, the defendant's evidence tending to show that it was but about two or three feet wide.

The defendant requested the judge to instruct the jury as follows: "1. The words of description in the bond are to be construed as defining and determining the bounds of the established way referred to in said bond, and not as creating a new way. 2. If the jury find that the platform was built with the shop and for use in connection with it in the manner described by the plaintiff's witnesses, then the expression in the bond 'to the shop of Joseph V. Kelley' must mean to the southwest corner of the platform (meaning the outer corner on the side next to Chadwick's shop)."

The judge declined to give these instructions, but instead thereof instructed the jury as follows: "The plaintiffs' theory is that there has been a breach of the bond given by Osborn to the plaintiffs. You have the bond which gives a description of a certain way, which Osborn bound himself and his representatives should be kept open substantially as described in the bond. If there is a permanent obstruction of that way, there is a breach of the bond, otherwise not. An important question is, where was the south corner of Joseph V. Kelley's shop. The plaintiffs' theory is that it was the corner of the upright building, and not of the platform. The defendant's theory is that it was the corner of the platform. The corner of the upright building being some distance, from four to six feet, from the corner of the platform, if the plaintiffs' theory is correct there has been a breach of the bond, but if the defendant's theory is correct there has not been. The question which of these corners was the one described in the bond is a question for the jury. If the platform was a part of the

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building in the same manner as a porch, veranda, piazza or outside flight of stairs would have been, then the corner of the platform is the corner spoken of in the bond. But if the platform was merely a platform made and used, not as a permanent part of the building, like a porch, veranda, piazza or outside flight of stairs, but only as a temporary convenience to the tenants of the building, then the 'south corner' did not mean the corner of the platform, but the corner of the upright part of the building. The precise question of fact, then, for the jury to decide, upon this part of the case, is, which kind of platform was this. The jury will decide this question upon the whole of the evidence. The plaintiffs contend that, even if this bound was the corner of the platform, yet the fence is further out into the way. To aid in ascertaining what are the bounds of the way described in the bond, the jury may consider the evidence which has been introduced in relation to the way existing before the bond was given."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

J. Brown, for the defendant.

G. Marston, for the plaintiffs.

AMES, J. If the platform, at the date of the bond, was a part of the building, then the corner of the platform is the corner spoken of in the bond, and the defendant's theory of the case is the correct one. When this case was before the court on a former occasion, this was adjudged to be the rule which should govern the new trial. 124 Mass. 151. In the judgment then given, an attempt was made to illustrate the proposition by likening the platform, in the mode of its attachment to the building, to a "porch, veranda, piazza or outside flight of stairs." It has unfortunately happened at the second trial, that what was meant merely as an illustration has apparently been taken as a literal definition; and a distinction has been made between temporary and permanent parts of the building, which was far from our intention. The question for the jury was, where at the date of the bond was the corner of the building, and not where was the corner of the "upright part" of the building. We did not anticipate that the ingenuity of counsel would devise any such subdivision of the building into different parts, as seems to have been carried out at the new trial. If the platform had been a movable chattel, so

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that it could be taken away bodily and replaced at pleasure, the case would be different. But if at the date of the bond it was in fact a part of the building, the fact that some subsequent occupant had no occasion to use it, or saw fit to take it away, ought not to be permitted to obscure the question as to the true course of the boundary line.

As the question was submitted to the jury upon a test which was not the true one, the defendant's

Exceptions must be sustained.

KATAMA LAND COMPANY *vs.* ALEXANDER JERNEGAN.

Dukes County. Oct. 25, 1878. — Jan. 21, 1879. ENDICOTT & LORD, JJ., absent.

A subscription for shares in a corporation, authorized by law to lay assessments upon shares, and to sell the shares for the non-payment of such assessments, imposes no personal liability upon the subscriber to pay assessments, unless he has expressly promised to do so.

A., with others, signed a paper, which recited that a certain corporation had been incorporated, the capital stock of which was fixed at $50,000, and by the terms of which the subscribers agreed with each other and with the corporation to take the number of shares affixed to their respective names, and to pay therefor $100 a share. Opposite A.'s name was a certain number of shares. The whole number of shares subscribed for exceeded $50,000. At a meeting called for the purpose of organization, a committee was appointed to report the names of the subscribers to the original capital stock of $50,000. The committee reported a list of names not including A.'s. The meeting then voted to increase the stock to $100,000, and that all the subscribers be admitted to the company with the rights and privileges of stockholders under the agreement. A. subsequently paid three assessments on his stock. *Held*, that an action against him on the original paper, for a subsequent assessment, could not be maintained, even if he knew of these votes before paying his assessments.

CONTRACT upon an agreement signed by the defendant and others, to recover an assessment made by the plaintiff corporation on ten shares of stock standing in the name of the defendant. The parts of the agreement now material to be stated were as follows: "Whereas, by act of the Legislature of Massachusetts in the year 1872, Erastus P. Carpenter, Joel H. Hills, Grafton N. Collins, and Nathaniel M. Jernegan, their associates

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and successors, are created a corporation, under the name of the Katama Land Company, for the purpose of purchasing, holding, improving, and disposing of land in the town of Edgartown, the capital stock of which corporation is fixed at fifty thousand dollars; now, therefore, the undersigned hereby associate themselves together to form said corporation, and severally subscribe for and agree each with the other and with said corporation to take the number of shares in said corporation affixed to their respective names, and to pay therefor the sum of one hundred dollars per share, at such times as shall be determined, upon the organization of said corporation: Provided, however, that the subscription shall not be binding until the whole amount of said capital stock shall have been subscribed." Opposite the defendant's name were written the words "ten shares."

Trial in the Superior Court, before *Rockwell*, J., who ruled that the plaintiff could not maintain the action upon the evidence introduced by it, and reported the case for the consideration of this court. The nature of the evidence appears in the opinion.

J. Brown, for the plaintiff.

T. M. Stetson & F. B. Greene, for the defendant.

MORTON, J. It is the well settled law of this Commonwealth, that a subscription for shares in a corporation, authorized by law to lay assessments upon shares and to sell the shares for the non-payment of such assessments, does not impose any personal liability upon the subscriber to pay assessments upon the shares, unless he has expressly promised to do so. *Mechanics' Foundry & Machine Co.* v. *Hall*, 121 Mass. 272, and cases cited. This action, therefore, can only be maintained upon the ground that the subscription paper signed by the defendant binds him to pay the assessment sued for.

The subscription paper provides that whereas the Katama Land Company has been incorporated, "the capital stock of which corporation is fixed at fifty thousand dollars; now, therefore, the undersigned hereby associate themselves together to form said corporation, and severally subscribe for and agree each with the other and with said corporation to take the number of shares in said corporation affixed to their respective names, and to pay therefor the sum of one hundred dollars per share, at such times as shall be determined, upon the organization of said

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corporation." The defendant subscribed for ten shares. The contract contains two promises by the defendant; one that he would take ten shares of the par value of one hundred dollars each in a corporation of which the capital is fixed at fifty thousand dollars; and the other, which is collateral to the first, that he would pay one hundred dollars upon each share at such times as should be determined by the corporation. It was one of the essential conditions of each of these promises that the capital stock of the corporation should be fifty thousand dollars. He agreed to take and to pay for one fiftieth part of the capital stock of the corporation. If this action is maintained, he would be required to take one one hundredth part of the capital stock, and this would impose upon him a contract different from that into which he entered. *Atlantic Cotton Mills* v. *Abbott*, 9 Cush. 423.

This is decisive of the case. It appeared at the trial, that, after subscriptions to the capital stock to an amount exceeding fifty thousand dollars had been obtained, the corporators called a meeting for the purpose of organization. The meeting appointed a committee "to report the names of subscribers to the original amount of capital stock of fifty thousand dollars." The committee reported a list of fourteen persons who had subscribed five hundred shares, which list did not include the defendant. He was thus excluded from any right to take part in the organization or management of a corporation having a fixed capital of fifty thousand dollars. He had no right to vote upon the question of increasing the capital stock. This action of the corporation rendered impossible the performance of the condition upon which alone he had promised to take stock and to pay for it, and therefore released him from responsibility upon the subscription paper. The fact that the meeting voted to increase the capital stock to one hundred thousand dollars, and also voted "that all the subscribers be now admitted to the company with the rights and privileges of stockholders under the agreement," could not create any liability of the defendant under the agreement. It is not material to inquire whether those votes, if known to the defendant, taken in connection with his subsequent payment of the first three assessments, would be sufficient evidence of a new agreement on his part to take ten shares in the corporation with

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the enlarged capital. Such an agreement is not declared on by the plaintiff.

For the reason stated above, without considering the other objections taken by the defendant, we are of opinion that this action cannot be maintained. *Judgment for the defendant.*

ELIZA J. MARKEY *vs.* MUTUAL BENEFIT LIFE INSURANCE COMPANY.

Essex. Nov. 8, 1878. — Jan. 11, 1879. ENDICOTT & LORD, JJ., absent.

An application for life insurance was made to an insurance company, which it found satisfactory; and it wrote a policy based on the application and sent the policy to its agent, who offered the policy to the person making the application, for inspection. The premium called for by the terms of the policy was not paid, and the policy was not delivered. *Held*, that an action could not be maintained against the company, under any form of declaration.

CONTRACT on a policy of insurance of the life of James W. Hoyt, the plaintiff's former husband, in the sum of $3000, payable on his death to the plaintiff; and on an agreement to insure. After the former decision, reported 118 Mass. 178, the case was tried in the Superior Court, before *Colburn*, J., upon the same pleadings, and the plaintiff offered the same evidence that she presented at the former trial, which is reported 118 Mass. 181–185, and the substance of which is stated in the opinion. The judge ruled that the plaintiff could not maintain the action; that no amendment of the declaration would avail the plaintiff; and that under no form of pleadings would the jury be authorized to return a verdict for her; ordered a verdict for the defendant; and the plaintiff alleged exceptions.

D. Saunders & C. G. Saunders, for the plaintiff. There was evidence proper to be submitted to the jury, of a contract entered into by the plaintiff and the defendant, which bound the defendant to make and deliver to her a policy upon the life of her husband. The plaintiff signed a written application for a contract of insurance, by the terms of which she was to pay the company a premium annually, the application setting forth the

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amount of the premium to be paid by a person of Hoyt's age, and forwarded it to the defendant for its acceptance. The defendant thereupon accepted her proposal, indorsed in writing such acceptance and the details of it on the application, and wrote, signed and sealed a policy for the agreed amount. The proposal and the acceptance ascertained the subject, the commencement and duration of the risk, the parties, the interest of the assured and the premium. Notice was given to her that her proposal was accepted, and the policy was sent to be delivered to her. The defendant's agent, Wells, said to Hoyt, that he had brought out to him his policy, recognizing his right to it, and the plaintiff assented to it; having so assented to the terms of the contract made upon her application, she tendered the premium within a reasonable time and demanded the policy. There was therefore a complete *aggregatio mentium;* a proposition on one side, acceptance of it on the other, and notice given of the acceptance. There was also a good and valuable consideration for this contract; the plaintiff promised to pay for the policy the stated premium and to pay it annually. The action could therefore be maintained. *Union Ins. Co.* v. *Commercial Ins. Co.* 2 Curtis, 524, and 19 How. 318. *Tayloe* v. *Merchants' Ins. Co.* 9 How. 390. *Perkins* v. *Washington Ins. Co.* 4 Cowen, 645. *Lightbody* v. *North American Ins. Co.* 23 Wend. 18, 25. *Hamilton* v. *Lycoming Ins. Co.* 5 Penn. St. 339. *Carpenter* v. *Mutual Ins. Co.*, 4 Sandf. 408. *Kentucky Ins. Co.* v. *Jenks*, 5 Ind. 96. *Sheldon* v. *Connecticut Ins. Co.* 25 Conn. 207. *Ide* v. *Phœnix Ins. Co.* 2 Bissell, 333. *Davenport* v. *Peoria Ins. Co.* 17 Iowa, 276. *Keim* v. *Home Ins. Co.* 42 Misso. 88. *Kohne* v. *Ins. Co. of North America*, 1 Wash. C. C. 93. *First Baptist Church* v. *Brooklyn Ins. Co.* 19 N. Y. 305. *Pratt* v. *Hudson River Railroad*, 21 N. Y. 305. *Post* v. *Ætna Ins. Co.* 43 Barb. 351, 362.

D. Foster, for the defendant, was not called upon.

SOULE, J. The evidence at the trial in the court below was identical with that given at a former trial, and reported in *Markey* v. *Mutual Benefit Ins. Co.* 118 Mass. 178. It was there decided that the whole evidence was insufficient to warrant the jury in finding that the policy had been delivered so as to constitute a binding contract; and that there was no evidence whatever that the defendant intended or was understood by the

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plaintiff or her husband to intend to make a contract of insurance in any other form. A re-examination of the case confirms us in the opinion there expressed, and we do not understand that the plaintiff contends that that decision requires any modification.

The judge who presided at the trial ruled, however, that the plaintiff had no cause of action, and that no amendment to the declaration would avail her, and that the jury would not be authorized to find a verdict for her under any form of pleadings.

In support of her exception to this ruling, the plaintiff insists that there is evidence in the case which would warrant a jury in finding a contract between the parties, which bound the defendant to make and deliver to her a policy on the life of her husband. We are of opinion that this position is not tenable. The evidence, in substance, is, that an application for insurance was made to the defendant, which it found satisfactory; that it wrote the policy, based on the application, and offered it to the plaintiff and her husband for inspection; that they did not pay the premium called for by its terms, and it was not delivered to either of them. Before this offer of the policy was made, the defendant did not communicate in any way with the plaintiff or her husband, after receiving the application. No contract of any kind, therefore, had been made between the parties; and, as has been already decided, the evidence did not show that any contract was made at the time of offering the policy. The question now presented by the plaintiff differs in form from either of the questions presented when the case was last before us, but the decision then given, as to the result of the evidence, involves the point now made. *Exceptions overruled.*

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JOHN H. WRIGHT *vs.* CITY OF BOSTON.

Essex. Nov. 7, 8, 1878. — Jan. 21, 1879. ENDICOTT & LORD, JJ., absent.

In an action against a city to recover the amount of a tax assessed on the personal property of the plaintiff on May 1, 1876, and paid under protest, there was evidence that he acquired a domicil in the town of B., which he retained until 1870; that in that year his father, with whom he had previously lived, moved to the town of N. and died in 1874; that the plaintiff, since 1870, had lived for some time each summer in a small house in N. with his brothers and sisters, which was owned by him and them, after his father's death; that, in 1872, his wife acquired a large estate in the city, with a house on it; that he had bought much land about it, and had since inhabited it exclusively except when at N.; that in this house were all his furniture, books and pictures. The plaintiff testified that when he left B. he intended to make N. his home, and that he never intended to make the city his home. *Held*, that there was evidence to warrant a verdict for the city.

On the issue whether a party to a suit had his domicil in a certain city on the first day of May, his declarations as to his residence in a letter by him to the assessors of the city, in reply to a circular sent to him by them; deeds in which he was grantor, describing him as of another place, one of which was to the city as grantee; his will, in which he was described as in the deeds; and the will of his father, in which he was so described, are all inadmissible in his favor.

CONTRACT to recover the amount of a tax assessed on the personal property of the plaintiff, on May 1, 1876, and paid by the plaintiff under protest.

Trial in this court, before *Gray*, C. J., who reported the case for the determination of the full court, in substance as follows:

The testimony of the plaintiff, who was the only witness in the case, tended to show that in 1858 he acquired a domicil in the town of Brookline, which he retained until the year 1870; that in 1869 he made a tour in Europe with his family, and returned in October, 1870, at which time his father, with whom he had always previously lived, had removed to Nahant; that in 1869 he sent notices to the assessors of Brookline and of Nahant, that he had removed to Nahant; that he had since spent some time, in the summer only, at a house in Nahant, which was of one story, with three attic chambers in a cottage roof, originally owned by the father, and, after his death in 1874, by the plaintiff, his two brothers and two sisters, and was managed, and all the furniture therein owned, by the two sisters; that in 1872 the plaintiff went to Nahant before May 1, but did not remain

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there continuously, and returned to Brookline in July; that in the subsequent years before May 1, 1876, he stayed at Nahant but a very short time in each year; that when at Nahant he stayed a good deal more with his father-in-law, as a guest, than at this house; and that it was unoccupied and closed, and the windows and doors securely boarded up, during the whole of each year, except the period in summer when it was occupied by the plaintiff or his brothers or sisters.

He also testified, that in July 1872 the father of his wife gave her as a present a valuable estate, including a large house of two full stories, with a third story in the mansard roof, and having eleven chambers, and with extensive stables and outhouses, in the town of Brighton, which became a part of Boston on January 1, 1874; that between July and December 1872 he spent much money in enlarging and improving this house and fitting it for occupancy by his family; that since December 1872 he occupied this house with his family, whenever he was not at Nahant, and owned all the furniture there, and had made large purchases of lands adjacent, and spent large sums of money in beautifying and adorning this house and lands.

It was admitted that the house in Brighton was very much finer and more valuable than that at Nahant; and that the house and grounds at Brighton were peculiarly adapted for occupation in summer as well as in winter, with lawns, ponds, shade trees, arbors, walks and seats; that his occupancy of it was not shared with any other than his own immediate family, that his books and pictures were in his Brighton house, and that it was the only exclusive residence of himself and family; and that since 1862 he had been continuously, and still was, in active business in Boston, and had never been in business in Nahant.

The defendant contended that the plaintiff acquired a domicil in Brighton or Boston at some time after the conveyance of this house and land to his wife, and prior to May 1, 1876; and the plaintiff contended that he had had his domicil at Nahant since his return from Europe in 1870; and he testified that when he left Brookline he intended to make Nahant his home, and that he never had any intention to make Brighton or Boston, or any other place, his home.

The following documents were offered in evidence by the

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plaintiff, and excluded: 1. A letter dated May 3, 1876, from the plaintiff to the assessors of Boston, in reply to a printed circular dated May 1, 1876, addressed to him by them, in which he stated that he had been a resident of Nahant for several years, and not of Boston. 2. Several deeds in which he was grantor and was described as "of Nahant in the county of Essex," one of which was dated March 24, 1876. 3. A deed from himself to the city of Boston, dated March 26, 1875, describing himself in like manner. 4. A will executed by himself on August 10, 1874, in which he was described as of Nahant, which it was agreed had been revoked by another will executed in 1877, and had been cancelled since such new will was made. 5. The will and several codicils of his father, John S. Wright, in which the testator was described as of Brookline in such of them as were made before 1870, and of Nahant in the residue, the last being dated in March, 1873.

The plaintiff contended that, as it was uncontroverted that in 1870 the plaintiff had his legal domicil in Brookline, there could be no new domicil acquired in Boston or Brighton without the intention of the plaintiff, and that as intention without acts was insufficient to work a change of domicil, so acts without intention were equally ineffectual; and therefore requested the judge to rule, that upon all the evidence the jury would not be authorized in finding that the plaintiff, on May 1, 1876, had a domicil and was legally taxable in Boston. But the judge ruled that there was evidence which would authorize the jury in finding that he had such domicil in Boston as to justify the assessment of the tax in question; and submitted the case to the jury under instructions to which no exception was taken. The jury returned a verdict for the defendant.

If any of the evidence excluded should have been admitted, or if the ruling above requested should have been made, a new trial was to be had; otherwise, judgment on the verdict for the defendant.

S. B. Ives, Jr. & S. Lincoln, Jr., for the plaintiff.

H. W. Putnam, for the defendant.

MORTON, J. The question whether the plaintiff had his domicil or home in Boston on May 1, 1876, was a question of fact to be determined by the jury under proper instructions. It

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involved an inquiry as to the acts of the plaintiff and the intention with which such acts were done. His testimony as to his intention was not conclusive. So much of the evidence as is reported shows acts of the plaintiff which have a strong tendency to prove that he had established his home in Boston before May 1, 1876. It was for the jury to determine, upon all the evidence, what was the intention of the plaintiff. The court therefore properly refused the request to direct a verdict for the plaintiff.

The other exceptions relate to the exclusion of certain evidence offered by the plaintiff.

It is a general rule of evidence, applicable in cases of this character as well as in others, that the declarations of a party are not admissible in his own favor. Such declarations are not made under oath, and are mere hearsay evidence. There is an established qualification of this rule, that, where an act of the party is admissible in evidence, any declaration accompanying and giving character to the act is competent. This is upon the ground that the declaration is a part of the act, or in other words is a part of the *res gestæ*. But such declarations are only admissible when the acts of which they are a part are competent. *Lund* v. *Tyngsborough*, 9 Cush. 36. *Salem* v. *Lynn*, 13 Met. 544. *Cole* v. *Cheshire*, 1 Gray, 441. *Monson* v. *Palmer*, 8 Allen, 551. *Kilburn* v. *Bennett*, 3 Met. 199. *Thorndike* v. *Boston*, 1 Met. 242.

Applying these principles to the case at bar, we are of opinion that the evidence offered by the plaintiff was rightly excluded.

The declarations contained in his letter of May 8, 1876, to the assessors of Boston, were not admissible. They were mere declarations in his own favor, not accompanying any act which was admissible in evidence.

The same is true of the declarations in the deeds made by the plaintiff, in which he described himself as "of Nahant." The deeds did not relate to any transaction which was material or admissible in evidence, and the declarations therein were therefore incompetent. One of the deeds was to the city of Boston, but the same rule applies to it. The acceptance of a deed by a grantee is slight evidence that the description of his residence therein is correct. He is presumed to know his own residence, and to have an interest in having it correctly stated. But a grantee

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cannot be presumed to know the residence of the grantor, and his acceptance of the deed, therefore, cannot be held to be an implied admission that the grantor's residence is correctly stated.

The description by the plaintiff of himself as "of Nahant," in his will executed in August 1874, was for the same reasons inadmissible. It was merely his declaration in a transaction which was immaterial and incompetent.

The plaintiff relies upon the case of *Wilson* v. *Terry*, 9 Allen, 214. That case is not very fully reported, but it is evident that the court did not intend to overrule the cases previously decided, which we have cited above. The declarations of the defendant's testator, which were held to be admissible, were in regard to the occupation of his farm and to the subject of voting; and, upon referring to the original bill of exceptions, it appears that most, if not all of them, were made at the time when he removed to Freetown. That the fact was assumed to be so is evident from the court's citing with approval the cases of *Thorndike* v. *Boston*, *Kilburn* v. *Bennett*, and *Salem* v. *Lynn*, above referred to, in all of which the doctrine is clearly recognized that a party cannot give in evidence his own declarations in his favor unless they accompany some act which is itself competent evidence, and are thus part of the *res gestæ*. It is clear that the court considered that these declarations fell within this rule.

In regard to the decision in that case, admitting the will of the defendant's testator, we are unable to see how it can be upheld, consistently with the previous decisions. This decision was apparently made upon the authority of *Ward* v. *Oxford*, 8 Pick. 476. In that case, the question was as to the settlement of a pauper, who, it was claimed, derived his settlement through his father from his grandfather. It was held that, as evidence tending to show that the settlement of the grandfather was in Oxford, office copies of a deed and a will made by the grandfather more than seventy years before the trial, in which he described himself as "now resident in Oxford," were admissible. The declarations admitted were not the declarations of a party to the controversy. Though such evidence may be competent in proof of an ancient transaction, in regard to which, as in questions of pedigree, the rule against hearsay evidence is relaxed, the case cannot be regarded as an authority to the point that the

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recitals in a recent deed or will are competent evidence in favor of the party making them, in a suit against him or his executor.

The case of *Wilson* v. *Terry* differs from the case at bar in the fact that the testator whose will was admitted had died, leaving the will unrevoked. But we are not able to see how this fact furnishes a valid ground for any distinction in principle. Upon an examination of the adjudications in this Commonwealth, we are brought to the conclusion that this case, at least so far as regards the admission of the will, is in conflict with the current of the authorities. As observed by Mr. Justice Metcalf, in *Capen* v. *Barrows*, 1 Gray, 376, 380, "an occasional wrong application of a principle is not a strange thing in jurisprudence; nor does it weaken either the principle itself, or the obligation of courts to adhere to it."

We are therefore of opinion, that the chief justice rightly rejected the will and the several deeds offered by the plaintiff at the trial.

The only other exception which the plaintiff insists upon is that to the exclusion of the will of his father in which he describes himself as "of Nahant." It is a sufficient reason for the rejection of this evidence, without considering others, that the residence of the father was not involved in the issue on trial, and was an immaterial fact. *Judgment on the verdict.*

WILLIAM F. WELD *vs.* CITY OF BOSTON.

Essex. Nov. 8, 1878.—Jan. 21, 1879. ENDICOTT & LORD, JJ., absent.

On the issue whether a party to a suit had his domicil in a certain city on the first day of May, his declarations as to his residence, in a letter by him to the assessors of the city, in reply to a circular sent to him by them, deeds to him as grantee, in which he was described as of another town, and evidence that he and his son were accustomed to talk over and discuss the affairs of such other town, are all inadmissible in his favor; but deeds to him as grantee, describing him as resident in the city, are admissible against him.

CONTRACT to recover the amount of a tax assessed by the defendant city on the personal property of the plaintiff, on May 1, 1876, and paid by the plaintiff under protest. Trial in this court,

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before *Gray*, C. J., who reported the case for the determination of the full court, in substance as follows:

It was admitted that, at some time prior to 1853, the plaintiff changed his legal residence from Boston to Brookline, and retained it there until 1869 or 1870; that during all that time he owned a house in both places, occupying his house in Brookline somewhat more than half the year, including May 1, and his house in Boston the rest of the time; that in 1869 he changed his city residence, and purchased an elegant and valuable estate on the corner of Beacon Street and Arlington Street, which he had since that time occupied, when not at Nahant or temporarily absent.

The plaintiff testified that in April 1870 he carried into effect a purpose previously contemplated, and hired a valuable and convenient estate in Nahant, and on the 28th of that month, having then removed from Brookline, he sent written notices to the assessors of Nahant, of Brookline and of Boston, that he had made his home at Nahant. These notices were admitted in evidence against the defendant's objection and exception. He also testified that he spent the summer of 1870 at this house; that in 1871 he spent most of the summer at Brookline, owing to sickness in his family, which made it impossible for him to leave; that in 1872 he hired and occupied another house at Nahant; and that in 1873 he hired still another house, and the furniture in it, which he had occupied during the season ever since, and that he had been looking for a suitable lot on which to build a house. The length of time spent in Nahant in the years after 1871 was in dispute, and the evidence was contradictory. There was also evidence tending to show that at nearly every town meeting held in Nahant since 1871 and before May 1, 1876, he had been present and voted, and in some of them taken part.

The plaintiff offered in evidence a letter from him to the assessors of Boston, dated May 2, 1876, in answer to a printed circular from them, dated May 1, 1876, in which he stated that he had not been a resident of Boston for more than twenty years; and that he had moved from Brookline to Nahant more than six years before, and was a householder and paid taxes there. This letter was excluded; but he was allowed to testify that he had paid poll and personal taxes in Nahant each year from 1870 to 1875 inclusive.

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The defendant identified and put in, without objection, during the cross-examination of the plaintiff, various deeds signed by the plaintiff, in which he was described as of Boston. The defendant also offered in evidence two deeds executed and delivered to the plaintiff as grantee, both dated in October 1877, and in which he was styled "William F. Weld of Boston in the county of Suffolk." The plaintiff objected, but the judge admitted them.

The plaintiff offered in evidence a deed from his son George W. Weld to the plaintiff himself, dated January 1873, in which he was styled as "of Nahant in the county of Essex." Upon the defendant's objection, this deed was excluded.

The plaintiff called his son William G. Weld as a witness, and asked him whether, in conversations between him and the plaintiff, the plaintiff was accustomed to discuss town affairs or to talk over town affairs. But the question was excluded.

The case was submitted to the jury, with instructions which were not excepted to; and no question was raised as to the sufficiency of the evidence (parts only of which were reported) to justify the verdict. The jury returned a verdict for the defendant.

If any of the evidence excluded should have been admitted, or if the admission of the evidence objected to by the plaintiff entitled him thereto, a new trial was to be ordered; otherwise, judgment on the verdict.

S. B. Ives, Jr. & S. Lincoln, Jr., for the plaintiff.

H. W. Putnam, for the defendant.

MORTON, J. For the reasons stated in *Wright* v. *Boston*, *ante*, 161, the letter of the plaintiff to the assessors was properly excluded.

The deeds of the plaintiff, in which he described himself as "of Boston," were rightly admitted. The recitals in such deeds were admissions by him that he resided in Boston, and were competent. For the same reasons, the deeds to him in which he was described as of Boston were competent. His acceptance of such deeds without objection was an implied admission of the correctness of the recitals. Though of little weight, the evidence was competent.

The deed from the son of the plaintiff, in which the latter was described as "of Nahant," was rightly rejected. This recital, con

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sidered as a declaration of the son was clearly incompetent; considered as a declaration of the plaintiff, implied from his acceptance of the deed, it was a declaration in his own favor, and therefore incompetent. *Wright* v. *Boston*, *ubi supra*.

The plaintiff offered to show that, in conversations between himself and his son, he was accustomed "to discuss and talk over town affairs." It was competent for him, and he was permitted, to show any acts of habitancy, such as residence in Nahant, paying taxes, voting, attending town meetings and taking part in the discussions. But a private conversation or discussion as to town affairs is not an act of habitancy, and, like any other declaration not accompanying an act which may be given in evidence, is not admissible in his favor. We are of opinion that the ruling rejecting this evidence was correct.

Judgment on the verdict.

JUSTUS J. SMITH *vs.* BENJAMIN L. EMERSON & others.

Essex. Nov. 7, 1878. — Jan 28, 1879. ENDICOTT & LORD, JJ., absent.

A building contract between A. and B. provided that A. should do the work and find the materials, and B. should pay for laying the brick, and furnishing all necessary stock, except the brick, at $14.00 per thousand, measurement 24 brick per cubic foot, less $7.45 per thousand to be paid by B. for the brick and freight. *Held*, that a sale of the brick to A. was not contemplated by the terms of the contract; that the difference between these sums was the price to be paid A. for laying the brick and furnishing materials necessary therefor, estimating twenty-four bricks to a cubic foot, and not the actual number laid; and that parol evidence was not admissible in explanation of the intent of the parties.

If a person furnishes labor and materials in the erection of a building, under an entire contract for a round sum, and cannot maintain a lien for the materials for want of the notice to the owner of the land of his intention so to do, required by the Gen. Sts. c. 150, § 2, he cannot maintain a lien for the labor, under the St. of 1872, c. 318, without showing what the labor alone was worth.

PETITION to enforce a mechanic's lien, alleging that the petitioner made a contract in writing with Luther D. Stiles to furnish the labor and materials, except the brick, necessary in doing the mason-work required in the erection of a block of buildings in Lawrence, according to specifications furnished by Stiles,

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and describing the land by metes and bounds; that, at the time of the performance of the labor thereon, the lot was the property of Benjamin L. Emerson or of Carrie M. Stiles; that the petitioner fully performed the contract on his part, and furnished extra labor, by direction of Stiles, to the amount of $110; that he began to furnish labor and materials on July 13, 1875, and ceased on November 11, 1875; that the total amount due him for labor and materials and extra work was $7544.10; that he had made a discount of $3275.15 on the brick and freight as agreed in the contract, and had received on account from Stiles and Emerson $3430; that these two sums, amounting to $6705.15, were the only just credits, and that he had applied them in payment for the materials furnished by him so far as necessary to pay for the same; that the balance of said sum he had applied to the payment for the labor furnished; and that there was still due him for labor the sum of $838.95.

The petition further alleged that Luther D. Stiles had authority from and was rightfully acting for the owner of the land in procuring the labor and materials which the petitioner furnished in the erection of said building; that he prepared, and on December 9, 1875, filed in the city clerk's office for the city of Lawrence, a statement in writing subscribed and sworn to by him, containing a just and true account, with all just credits given, of the amount due him for labor furnished by him as a mason in the erection of said building, with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner.

The prayer of the petition was, that the premises might be sold, and the proceeds of the sale applied to the discharge of the petitioner's claim for $838.95 for labor furnished by him on said building, together with interest and costs.

The certificate of lien set forth the account as above stated.

Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found that on July 13, 1875, the respondent Luther D. Stiles had a bond from the respondent Benjamin L. Emerson, for a conveyance to Stiles of the land described in the petition, Emerson being then the owner in fee of the land; and that on July 13, 1875, Stiles made the following contract with the petitioner, which was partly in the handwriting of Emerson:

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"The following agreement between Luther D. Stiles and J. J. Smith is, that said Smith is to accomplish the work, and find materials as set forth, and said Stiles is to pay for laying the common brick and furnishing all necessary stock, except the brick, at $14.00 per thousand, measurement 24 brick per cubic foot, less $7.45 per thousand, to be paid by said Stiles to Sargent and R. R. Co., for the brick and freight; the said Smith to take the brick on the cars in Lawrence; and for the face brick and the stock necessary for laying, except the brick and staging, at $24.00 per thousand, measurement 24 brick per cubic foot, less $17.20, to be paid by said Stiles to Sargent and R. R. Co., for the brick and freight, the said Smith taking the brick on the cars in Lawrence, including walls and piers and all brick-work about the block, except jobbing, done upon this contract to pay the said Smith of this amount eighty per cent every Saturday as the work progresses, and the balance thirty days from the time the walls and chimneys are topped out. This agreement to cover all brick-work, and stock therefor, except the brick, necessary to complete said Stiles's projected block of stores in Lawrence, Mass., upon land described in said Stiles's bond therefor, upon which he has already put in the foundation."

On the same day, the respondent Emerson executed, and delivered to the petitioner, a paper, whereby, in consideration of $100 to be paid by Smith, he guaranteed to Smith on the completion of his contract of even date, "for furnishing all the labor and stock except bricks," for the erection and completion of a block of stores on the land described in his bond, the sum of four thousand dollars, "this guaranty not to cover any loss of time, delay or damage by whomsoever occasioned, or extras, for which I do not hold myself responsible, but only guaranteeing payment upon accomplishment as aforesaid, the whole to be accomplished by the said Smith, within two months from this date. And it is not the intention of this guaranty to do anything except to insure the payment of the money as aforesaid, for the consideration mentioned, and not in any event to charge said land with a lien by virtue of chapter one hundred and fifty of the General Statutes of this Commonwealth, or acts amendatory thereof."

The petitioner began work, in the performance of his contract with Stiles, on July 13, 1875, and ceased work on November 11,

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1875, furnishing all the stock and materials, excepting the brick furnished by Stiles under his contract with the petitioner. Under that contract, the petitioner received three hundred and eighty-one thousand nine hundred common bricks, and twenty-five thousand face bricks, and laid the same in erecting the building. By measurement made of the brick-work of the building, it appeared that the number of cubic feet thereof, upon the supposition that twenty-four bricks were laid in each cubic foot, would have required four hundred and eighty-five thousand nine hundred common bricks, and twenty-five thousand face bricks. The petitioner contended that, upon the legal construction of the contract, he was entitled to be paid for laying the bricks as if he had laid twenty-four bricks in every cubic foot, irrespective of the number of bricks actually laid in each cubic foot, and, upon this basis, made and filed his certificate, statement and account of labor in the office of the clerk of the city of Lawrence, within thirty days after November 11, 1875.

There was no evidence, at the trial, of the quantity or value of lime, sand, hair, and other stock and materials, exclusive of bricks, provided or used by the petitioner in erecting the buildings; or any evidence tending to prove how much of the balance of account, claimed by the petitioner in his petition, was for labor, and how much of it was for stock and materials, provided or used by him, in the erection of the building. The extra labor was furnished more than thirty days before the petitioner filed his certificate of lien. The petitioner received the sum of $3430.00, which was paid to him by Emerson. At the trial, the petitioner admitted that he had received $100 more than the sum of $3430.00, and said he was ready to allow a further credit of $100, the consideration named in the respondent Emerson's guaranty, hereinbefore set forth. These inaccuracies in the petitioner's statement of his account, contained in his certificate, the judge found were not due to petitioner's wilfully and knowingly claiming more than was his due.

The judge also found that the petitioner erected the buildings, under his contract with Stiles, with the consent of Emerson, and that Emerson advanced to Stiles substantially all the money paid to the petitioner under the contract, and paid for the bricks furnished to the petitioner under the contract; and that such

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advances and payments were contemplated by him and Stiles, when Stiles contracted with the petitioner for the erection of the building; that Emerson was also present from time to time directing the work done by the petitioner in erecting said buildings, both the extra work and the work done by the petitioner under his contract with Stiles.

The judge also found that, upon the construction of the contract between Stiles and the petitioner, contended for by the respondents, namely, that such contract entitled the petitioner to be paid $14.00 less $7.45, that is to say, $6.55 for each thousand of common brick actually laid by him, and $24.00 less $17.20, that is to say, $6.80 for each thousand of face brick actually laid by him, the respondents had fully paid the petitioner, and that nothing was due to him under the contract for labor or materials or for extra work, or use of derrick in erecting the building; that, upon the construction of the contract contended for by the petitioner, the balance of account between the petitioner and Stiles, under the contract, and for extra work, was the sum of $638.95.

On November 6, 1875, Emerson conveyed the land in question to Carrie M. Stiles, wife of Luther D. Stiles, and on the same day the same land was mortgaged to Emerson by Carrie M. Stiles.

The petitioner contended that the contract was obscurely expressed, and offered evidence of the situation of the parties to it, the circumstances under which the contract was made, and of the intent of the parties at the time of making it, for the purpose of determining the true meaning thereof. The judge rejected the evidence offered, and ruled that the respondents' construction of the contract was correct.

The petitioner also asked the judge to rule as follows: "Although the petitioner entered into a contract with Stiles, to erect said building on land of Emerson, with an understanding between him and the respondents that Stiles had a bond from Emerson for a conveyance of the land, yet, it appearing as a fact that, after the execution of said contract, Stiles never purchased the premises, or performed his part of the contract with the petitioner, but that Emerson purchased all the bricks and lumber used in erecting the building, and paid the petitioner for his

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labor and materials on the same, so far as he was paid, and in accordance with the contract; that Emerson was often present during the erection of the building, and directing as to the manner of building the same; that the petitioner, during his work on the building, always acted under the direction of Emerson, and received his pay from him and from no one else; and that, so far as the facts disclose, Stiles never had any interest in the said building or gave any orders concerning erecting the same; Emerson would be deemed in fact and in law to have been the purchaser of all the materials and labor furnished and used in the erecting of said building, and to have assumed said Stiles's contract as his own; and that therefore the petitioner has a lien on said premises, as against Emerson, for his labor and materials furnished under the contract, and also a lien on the same, against Emerson, for a general balance of account." The judge refused so to rule; but ruled, that, irrespective of the disputed construction of said contract, the petition could not be maintained for a general balance of account between the parties, under the contract between the petitioner and Stiles; that the petitioner could not maintain the petition for extra work, because the same ceased more than thirty days before the petitioner filed his certificate of lien in the office of the clerk of the city of Lawrence; and that upon the certificate, the facts alleged in the petition, and the facts found at the trial, hereinbefore stated, the petition could not be maintained; and ordered judgment for respondents. The petitioner alleged exceptions.

J. C. Sanborn, for the petitioner.

No counsel appeared for the respondents.

SOULE, J. By the true construction of the contract between the petitioner and Stiles, and the conduct of the parties thereunder, the petitioner did not furnish the brick for the block of stores. The statement of one price for the brick, and another price for the brick when laid, was adopted as a mode of computing the price which the petitioner was to be paid for labor and material and stock furnished in laying the brick; and a sale of the brick to him was not contemplated. *Westfield* v. *Mayo*, 122 Mass. 100. The petitioner, therefore, has at best only a demand for labor and materials furnished under a written contract in which no separate price for labor is specified, and no evidence

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was offered by means of which it could be determined what part of the demand was for labor, or what part was for material. The petitioner cannot maintain a lien for the whole balance due him for labor and material, because his contract was not with the owner of the land, and he did not give the notice required by the statute of his intention to claim a lien for materials furnished. Gen. Sts. *c.* 150, § 2.

He cannot maintain a lien for the labor, because he has not been able to show distinctly what the labor is worth, nor what part of his demand is for labor. St. 1872, *c.* 318. And until the last-named statute was enacted no lien existed for the labor done or furnished under an entire contract for labor and materials, when there was no lien for the materials. *Graves* v. *Bemis*, 8 Allen, 573. *Morrison* v. *Minot*, 5 Allen, 403.

In this view of the case, the construction of the contract so far as it relates to the number of brick for which the petitioner was entitled to be paid would be unimportant, but for the question whether the petitioner can maintain a lien for the extra work; but as the construction which we give the contract disposes of that question, as well as of his demand under the contract, it is proper that it should be stated.

As has been already indicated, the petitioner did not furnish the brick. There is no reason, therefore, why his account should charge Stiles with them. It should merely charge him with the agreed price for laying, including labor and materials, in one price, which is $6.55 per thousand for common brick, and $6.70 per thousand for face brick. As it was agreed that he should be paid at the rate of twenty-four brick to the cubic foot, he is entitled to the benefit of that stipulation, and to be paid for the constructive laying of one hundred and four thousand brick, that being the number by measure in excess of the number by count. If the account is made up in this way, it appears clearly that the petitioner has been paid more than his work and materials under the contract, his extra work, and the use of the derrick amount to. The error in his statement of his demand lies in his charging Stiles with both the price and the cost of laying the one hundred and four thousand of brick, which existed only by virtue of the arbitrary allowance of twenty-four brick to the cubic foot, and failing to credit him with the price of the same, which error

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made Stiles his debtor, in excess of the truth, by the sum of $774.80.

The construction of the contract was for the court, and the evidence offered in explanation of it was properly rejected. The ruling asked for was properly refused, for there was no evidence which would justify the ruling, as matter of law, or the finding, as matter of fact, that Emerson was the purchaser of the material or had assumed Stiles's contract. His conduct in the matter is fully explained by his having guaranteed the performance of the contract on the part of Stiles. Moreover, neither the certificate recorded in the office of the city clerk, nor the petition, is based on the theory that the brick were laid under a contract with Emerson. The ruling that the petition could not be maintained was correct. *Exceptions overruled.*

CATHARINE RONAN *vs.* HENRY DUGAN.

Essex. Nov. 8, 1878. — Jan. 28, 1879. ENDICOTT and LORD, JJ., absent.

Evidence that the complainant, in a bastardy process, had criminal intercourse with a man, other than the respondent, less than seven and a half months before the birth of her child, is inadmissible, in the absence of evidence that the birth was premature.

COMPLAINT under the bastardy act, Gen. Sts. *c.* 72. At the trial in the Superior Court, before *Brigham*, C. J., without a jury, the complainant testified that she was delivered of a child on September 14, 1877; and that it was begotten by the respondent on or about the last of December 1876, or the first day of January 1877. There was no other evidence in regard to the birth of the child.

On cross-examination, the complainant was asked if she had had criminal intercourse with William Wallis, in February 1877. This was objected to by the complainant; and the judge ruled that, the complainant having proved that the child was born on September 14, 1877, which was not disputed, the respondent could not show that the complainant had intercourse with any other man in February 1877, without first proving that the child was so prematurely born that it might have been begotten in

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February; and refused to allow the question to be answered. The judge found that the respondent was guilty; and he alleged exceptions.

C. A. Benjamin, for the respondent. The time inquired of was within the time when the child might have been begotten; and the burden was not on the respondent to prove that the child was prematurely born. *Parker* v. *Dudley*, 118 Mass. 602. See also *Thayer* v. *Thayer*, 101 Mass. 111.

H. Wardwell, for the complainant.

AMES, J. In cases of this kind, the admissibility of evidence of illicit intercourse of the complainant with any man other than the defendant depends upon its relation to the time when the child was born. In *Eddy* v. *Gray*, 4 Allen, 435, where the intercourse offered to be proved occurred more than ten months before the birth, the evidence was held to be inadmissible, without proof that the period of gestation was prolonged beyond the usual duration. We see no reason why the same rule should not be followed where the intercourse offered to be proved took place less than seven and a half months before the birth, in the absence of any proof that the birth was premature. The testimony of the complainant, and the presumption of law as to the period of gestation, concurred; and the judge, who tried the cause without a jury, might well consider the evidence offered by the defendant as immaterial. *Exceptions overruled.*

ANTHONY HATCH *vs.* MOSES HAWKES.

Essex. January 3. — 28, 1879. COLT & ENDICOTT, JJ., absent.

A person, whose land is laid out under the St. of 1869, c. 237, by the selectmen of a town, as a gravel and clay pit, cannot, after claiming and accepting his indemnity in the manner pointed out in the statute, insist upon any informality in the proceedings laying out the land.

Under the St. of 1869, c. 237, § 1, authorizing cities and towns to lay out lots of land as "gravel and clay pits," and the taking therefrom of "earth and gravel necessary to be used in the construction, repair or improvement of the streets and ways," any earth, gravel or stones, suitable for the purpose mentioned, and capable of being dug out of the ground and removed by ordinary excavation, may be taken.

If a surveyor of highways takes stones from land laid out as a gravel and clay pit

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under the St. of 1869, c. 237, and leaves some of the stones on the highway and some on adjoining land of the person whose land is so taken, the act, if not wantonly done, and if reasonably necessary and incidental to the convenient and proper use of the gravel pit for the purposes for which it was laid out, is not a conversion for which he is liable.

If the selectmen of a town, under the St. of 1869, c. 237, lay out land for a gravel and clay pit, and the owner, upon proceedings before the county commissioners for the assessment of damages, offers in evidence a claim for stones taken from the land, which is excluded, and he obtains judgment against the town for the taking of "gravel" only, which judgment is satisfied, he cannot afterwards maintain an action for the conversion of the stones against the surveyor of highways of the town, who took and used them in the repair of the highway.

TORT for the conversion of a quantity of stone. Writ dated May 3, 1877. Answer: 1. A general denial. 2. That the defendant, at the time of the alleged conversion, was surveyor of highways for a certain district in Saugus; and that, in taking the stone, he was acting in his capacity as surveyor. At the trial in the Superior Court, before *Brigham*, C. J., without a jury, the following facts appeared:

In July 1870, and at the time this action was brought, the plaintiff was the owner of a tract of land in Saugus. At a legal meeting of the inhabitants of the town, held on July 6, 1870, pursuant to a warrant, one article of which was as follows, "To see if the town will accept the piece of land, as laid out by the selectmen, for gravel and other material for the use of the town, on land of Anthony Hatch," it was voted to accept the piece of land, as laid out by the selectmen, on Lincoln Avenue, belonging to Anthony Hatch, as follows: "We, the subscribers, selectmen of the town of Saugus, have laid out for the use of the town, for the purpose of procuring materials for the repairing of roads, &c., a certain piece of land on Lincoln Avenue, belonging to Anthony Hatch, as follows, viz.: beginning at a stake by the wall, on the easterly side of said avenue, near the Wiggin House, so called, thence, south 41½° west, 125 feet to a stake; thence, at right angles, 50 feet in an easterly direction; thence, at right angles, 125 feet to a stake; thence, at right angles, 50 feet to the stake first mentioned; the town to take such material as may be wanted for the above purpose down to the present grade of the road, or an average depth of fifteen feet, for the term of ten years. And we award to Anthony Hatch the sum of $150, to be paid by said town of Saugus."

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The defendant, from June 1870 to the spring of 1877, was surveyor of highways in Saugus, within and for the district in which the land was situated, to which the above proceedings related. At least seven days before the above proceedings of the selectmen, a written notice of their intention to lay out said land, for the purpose of procuring materials for repairing highways, &c., was given to the plaintiff, and a plan of the land, with the above certificate of the selectmen, was filed in the office of the town-clerk.

The defendant, acting in his capacity of surveyor, from time to time between July 6, 1870, and the date of the writ, took gravel from the plaintiff's land, and within the limits described in the certificate of the selectmen, and used it in repairing the highways of the town within his district; and also took from said land stones varying in size from three inches to two feet in diameter, some of which were removed outside of the land and laid on the sides of Lincoln Avenue, and on the plaintiff's land, for the convenience of the defendant in getting access to and removing gravel from the land, and some of the stones were used in laying a foundation for gravel upon and in widening the highway, and a small quantity of the stones, not exceeding $10 in value, were given away to persons who removed them from the land.

The plaintiff contended that the defendant, under the proceedings of the selectmen and of the town, was authorized to take from the land gravel only; and, if authorized to take other materials from the land, to take them for the purpose only of repairing the highways. The judge found that the stones taken by the defendant were not within the ordinary meaning of the word "gravel," but were larger than "gravel," and were also not "earth," which the judge found to consist of particles of earthy matter smaller than "gravel;" but that they were, those of the smallest size unbroken and those of the largest size when broken, materials proper and customary to be used, and such as are ordinarily used, as a foundation for deposits of gravel thereupon, in constructing, widening and repairing highways.

At December term 1874 of the Superior Court, the plaintiff obtained judgment, which was satisfied, against the town, for $429.76, upon proceedings before the county commissioners for the assessment of damages for the laying out of his land by the

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selectmen of Saugus, as above stated. The judge found that the damages assessed at these proceedings were for gravel only; that, in a trial by jury upon his petition, the plaintiff offered in evidence his claim for stones taken from the land, which were the same stones for the taking of which by the defendant the plaintiff claimed damages in this action; and that such evidence was excluded.

The defendant asked the judge to rule as follows: "1. Upon the above facts, the taking of the land by the selectmen was legal. 2. The plaintiff is estopped to deny the legality of the taking, by reason of his judgment, and the payment to him of his verdict. 3. Under said taking, the defendant was justified in taking the stones for repairing and widening the highways. 4. Under said taking, the defendant was justified in taking the said stones for widening said highway, although for the purpose of constructing and not repairing the same. 5. The term 'material' in said taking is coextensive in meaning with the terms 'earth and gravel' in the St. of 1869, *c.* 237, and the stones alleged in the plaintiff's declaration are 'material' within the meaning of the taking, and are 'earth or gravel' within the meaning of the statute. 6. The plaintiff cannot maintain his action upon the present declaration for the stones which were never removed from his land, but which were taken from the land described in the taking and were placed by the roadside upon his adjoining land. 7. The fact, if it be one, that the plaintiff was not permitted to prove the value of the stones upon the trial of his petition for damages arising from the taking, cannot restrict the legal construction of the taking itself; and the terms of said taking and of the statute must receive the same construction, whether the rulings as to the measure of damages, or any other rulings in that proceeding, were right or wrong."

The judge refused to give the rulings requested; ruled that the action could be maintained; and found for the plaintiff, in the sum of $100. The defendant alleged exceptions.

C. F. Caswell, for the defendant.

S. B. Ives, Jr., for the plaintiff.

AMES, J. It appears upon this bill of exceptions that the selectmen of Saugus, acting under the authority conferred by the St. of 1869, *c.* 237, § 1. had selected and laid out a lot of land in

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that town, belonging to the plaintiff, as a gravel pit, for the purpose of procuring earth and gravel to be used in the repair of roads. The limits of this appropriation of the plaintiff's property were defined with sufficient precision, and the plaintiff has claimed and recovered his damages in the manner prescribed by the statute. The terms of the laying out by the selectmen were not literally the same as those used in the statute, but there was, in our judgment, no material variance; and even if there had been, it is too late for the plaintiff, after claiming and accepting his indemnity, to insist upon any informality in the proceedings.

The plaintiff brings this action upon the ground that, besides taking gravel from his land, which he admits that the town had a right to do, the defendant, acting as surveyor of highways for the town of Saugus, has taken away stones varying in size from three inches to two feet in diameter, not included under the description of gravel, and which for that reason, as he contends, the town had no right to appropriate. The judge, who tried the case without a jury, has found as a fact, that these stones were not within the ordinary meaning of the word "gravel," although they were materials proper to be used, and ordinarily used, some of them broken and some unbroken, as a foundation for deposits of gravel thereupon, in constructing, widening and repairing highways. And it was therefore ruled that the plaintiff could recover in this action the value of the stones so removed by the defendant.

The statute above referred to gives to the town the right to select and lay out lots of land "as gravel and clay pits, from which earth and gravel necessary to be used for the construction, repair or improvement of streets and ways" may be taken. The words "earth and gravel" are not defined in the statute; but they must be interpreted with reference to the preceding general phrase "gravel and clay pits," to the purpose for which such a right is to be exercised by the town, and to the use that is to be made of the material when taken. Whether, if upon trial the supposed gravel-bank should prove to be a solid ledge of rock, the town could lawfully proceed to remove it by drilling and blasting, is a question not now before us. We are clearly of opinion, however, that the town may take any earth, gravel or stones suitable for use in repairing and constructing roads, and capable of being dug out of the ground and removed by ordinary excavation. The

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words "earth and gravel" are not to be taken with such extreme strictness as to require that the gravel should be screened, or that the question should be raised and decided judicially how large a pebble or movable stone must be, in order to cease to be included in the general description of "earth or gravel." We think it was an error, therefore, in the learned judge to hold that the plaintiff was entitled to recover anything in this action, for stones actually used by the defendant acting in behalf of the town in the repair or improvement of the roads.

As to the stones which were removed from the land and left, some by the roadside and some upon other land of the plaintiff, if this act was not wantonly done, but was reasonably necessary and incidental to the convenient and proper use of the gravel pit for the purposes for which it was taken, it was not a wrong for which the plaintiff in this action can recover damages. They were not converted by the defendant to his own use. Compensation for this claim, if recoverable at all, should have made a part of his damages in the proceeding before the county com missioners.

The fact that on the appeal from the county commissioners the plaintiff was not permitted to offer evidence of his claim for the stones taken from his land, would not, upon the view we have taken, furnish any valid reason for maintaining the claim here. He must be understood as having recovered in that process all that was claimable under it. If, at the trial, any mistake occurred in laying down the rule of damages, or in excluding evidence which should have been admitted, he should have tendered a bill of exceptions, in order to save his rights.

Exceptions sustained.

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CHARLES H. DOLAN *vs.* ALBERT THOMPSON & others.

Suffolk. March 11; October 16, 1878. — January 1, 1879.

A factor, who receives consignments of goods under an agreement by which he is to advance to his principal money from time to time as the latter requires, to charge him interest on the advances at a certain rate, to sell the goods consigned at the market price, to charge a certain commission for selling, and, after deducting advances, interest and commission, to pay the balance to the principal, and if, upon settlement, after all the goods are sold, a balance is found due the factor, the principal is to pay it, may, after having made large advances to the principal on account of goods not sold, and which have been on hand for several months, sue the principal for the amount of the advances already made, without waiting until all the goods are sold.

TORT for malicious prosecution. Writ dated February 20, 1875. Answer, a general denial.

At the trial in this court, before *Lord*, J., the plaintiff introduced in evidence a copy of the record of the action brought against him by the defendants, by which it appeared that the writ was dated March 5, 1874, returnable at April term 1874, that the declaration was on an account annexed for $2981.84, for money advanced, and that an attachment was made of his goods; that at July term 1874, an answer *puis darrein continuance* was filed alleging that since the commencement of the action the plaintiffs therein had sold property of the defendant to an amount greater than the amount of their advances to the defendant; that at January term 1875, the plaintiffs discontinued their action; and that judgment for costs was entered in favor of the defendant.

The plaintiff testified that, in the latter part of August or the early part of September 1873, he made an agreement with the defendants, by which he was to consign to them finished calfskins; and they agreed to advance him money thereon from time to time, as he required, to charge him interest at the rate of seven per cent per annum upon the money so advanced, to sell the skins so sent to them at the market price, to deduct five per cent commission from the amount of the sales for selling, and, after deducting their advances, interest and commissions, to pay the balance to the plaintiff; that if, upon settlement, after all were sold, a balance was found due the defendants, the plaintiff was to pay

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it; that, under this agreement, the plaintiff sent a large quantity of finished skins to the defendants, and received advances on the same; that in December 1873, the defendants declined to make any further advances on skins at seven per cent interest, but said they would receive and sell his skins on commission; that thereupon the plaintiff consigned skins thereafter dressed to other persons, who made advances thereon; that on March 5, 1874, the plaintiff received from a firm of attorneys a letter requesting him to call and settle a demand in their office against him; that he immediately called upon them, when he was informed that an action had been bronght against him by the defendants, and a keeper put in his factory; that he soon after obtained from the defendants an account showing that they claimed a balance due them, at the time the action was brought, of $2,981.84, for advances made on skins then held by them for sale; that, at the time said action was brought, the defendants had in their possession, unsold, a large quantity of skins sent them under the agreement, of the market value exceeding $6,000; that in March 1874, the defendants made further sales of the skins, amounting in all to $3,733.20, after the commencement and prior to the entry of said action; that afterwards the defendants sold the balance of the skins remaining in their hands, to the amount of $1,796.15, prior to judgment in said action; that, immediately after the plaintiff received notice of said action from the defendants' attorneys, he made arrangements for an advance of money with which to pay the amount claimed by the defendants, and went to them and requested them to deliver the skins remaining in their hands to the person who was to make the advance, and receive the amount due them, but they declined to receive the money or to allow him to remove the skins; that on March 14, 1874, he forbade the defendants to make further sales of the goods consigned to them; that the officer, by virtue of the writ in said action, removed the property of the plaintiff, and other property found in the plaintiff's factory, consisting of skins in the process of dressing, and in an unfinished condition, to the store of the defendants, which property there became heated, moulded and worthless; that the defendants, subsequently to October 6, 1874, the date of the last sale made by them, rendered an account to the plaintiff of all sales of skins sent them under the agreement,

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showing a balance in the plaintiff's favor; and that the defend ants never requested him to pay them any money, nor made any demand whatever upon him, until by the letter sent him by their attorneys, which was not received by him until the action had been brought and the attachment of his property made.

Upon this evidence, the judge ruled that the plaintiff could not recover; and directed a verdict for the defendants. The plaintiff alleged exceptions.

The case was argued in March 1878; and additional briefs were submitted to the whole court in the following October.

I. W. Richardson & J. W. Keith, for the plaintiff.

R. M. Morse, Jr., (*J. H. Hardy* with him,) for the defendants.

SOULE, J. The plaintiff cannot maintain his action unless the evidence would justify a finding by the jury that the suit which is charged to have been malicious was instituted without probable cause by the defendants. The plaintiff contends that, by the terms of the contract between the parties, the defendants were to wait till all the goods consigned to them had been sold, before calling on him for repayment of moneys advanced to him; and if this were so, it would be plain that there was no cause of action against him. But we do not so interpret the contract. The agreement was oral, and, as testified to, contains only a specification of certain of the rights and duties of principal and factor, and does not, in terms, nor by implication, take away from the factor any rights which he would have had but for the agreement. When it is intended to change, in any particular, the well established rights between such parties, it must be done by an agreement which clearly points to that result; otherwise, it will be presumed that their dealings are governed by the rules of law ordinarily applicable to dealings of that nature. Accordingly, the defendants, having advanced largely to the plaintiff on account of goods not sold, and which had been on hand for several months, were entitled to recover of the plaintiff the balance of account in their favor when the suit was begun. They had the right to look to the goods in their hands as security, and the fur ther right, in the absence of an agreement to the contrary, to sue for the amount due them. *Beckwith* v. *Sibley*, 11 Pick. 482. *Upham* v. *Lefavour*, 11 Met. 174. *Exceptions overruled.*

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CHRISTOPHER S. DWYER *vs.* HENRY WINTERS & another.

Suffolk. Nov. 14, 1878. — Jan. 11, 1879. COLT & MORTON, JJ., absent.

A notice in writing, addressed to the creditor, giving only the initial letter of his first name, and reciting that "Henry D. Winter, debtor, arrested on an execution in your favor, desires to take the oath for the relief of poor debtors," sufficiently describes the debtor, that being his true name, although he was described in the writ, execution and recognizance as "Henry Winters."

CONTRACT on a recognizance, entered into on April 8, 1876, under the Gen. Sts. *c.* 124, § 10, by the first-named defendant as principal, and the other as surety, and containing the usual conditions. The case was submitted to the Superior Court on an agreed statement of facts in substance as follows:

The name of the defendant, described in the writ as Henry Winters, is Henry D. Winter. No other person of the name of Henry D. Winter is known to the parties. The plaintiff, by the name of Christopher S. Dwyer, recovered judgment against the first-named defendant in the Municipal Court of Boston, in an action in which the latter was described and summoned as Henry Winters, and in which he made no appearance, judgment being rendered by default. An execution on the judgment issued against the defendant in the name of Henry Winters, on which he was arrested, and he afterwards entered into the recognizance in suit with the other defendant. The magistrate's record of the recognizance indorsed on the execution stated that the within named Winters recognized, &c.

Winter gave to the plaintiff the following notice of his desire to take the oath for the relief of poor debtors: "To C. S. Dwyer, creditor: Henry D. Winter, debtor, arrested on an execution in your favor, desires to take the oath for the relief of poor debtors. Wilmon W. Blackmar, Master in Chancery." The defendant Winter appeared at the time and place appointed in the notice, and, the plaintiff not appearing, the magistrate administered the oath for the relief of poor debtors to Winter. The plaintiff did not procure the arrest of any other person upon any execution within thirty days of that time.

If, upon these facts, the plaintiff was entitled to recover, judgment was to be entered for him; otherwise, for the defendants.

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The Superior Court ordered judgment for the defendants; and the plaintiff appealed to this court.

R. Lund & E. J. Welsh, for the plaintiff.

J. B. Goodrich, for the defendants.

AMES, J. A judgment debtor who has been arrested on an execution, and who has recognized to deliver himself up for examination, in order to obtain the relief provided by statute for poor debtors, is bound to seasonably inform the creditor of the time and place appointed for the examination. The statute prescribes no specific form of notice in such a case, and any form of notice would undoubtedly be held sufficient that imparts this information, even though it identifies the execution (in case there has been but one) by a simple reference in general terms to an execution in favor of the creditor upon which the debtor has been arrested. Although the notice in this case was to C. S. Dwyer, instead of giving the plaintiff's name at length, it cannot for a moment be supposed that the creditor on whom the notice was served could have failed to understand that the notice was meant for himself. He knew also that he held an execution against a person whom he had described as Henry Winters, and had caused him to be arrested. The notice informed him that a person, whom he had caused to be arrested on execution, was seeking to be relieved from arrest and imprisonment by taking the oath as a poor debtor. He might have inferred from the tenor of the notice that there had been some mistake as to the true name of the debtor, by the omission of the initial letter of a middle name, and the addition of the letter "s," but he must have understood that Henry D. Winter professed to be the identical person who had been arrested on that execution. There was no other execution to which the notice could possibly apply. Under the circumstances, the import of the notice could not be misunderstood or mistaken. Its legal effect was the same as if it had been thus expressed, viz. "Henry D. Winter, arrested on an execution in your favor under the name of Henry Winters, desires to take the oath," &c. The notice given was therefore substantially such as the statute requires. See *Dana* v. *Carr*, 124 Mass. 397; *Hill* v. *Bartlett*, 124 Mass. 399.

Judgment affirmed.

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ALEXANDER H. HOLWAY *vs.* CHARLES E. FULLER.

Suffolk. Nov. 22, 1878. — Jan. 11, 1879. COLT & MORTON, JJ., absent.

In an action on an agreement of indemnity, it appeared that the plaintiff had been applied to by A. to negotiate a loan on a certificate of stock as collateral security; that he then applied to the defendant, who said he suspected that the certificate was not genuine, agreed to lend the money if it was genuine, requested the plaintiff to bring A. to the defendant's office, and made arrangements to have A. arrested there in case the certificate was not genuine. The defendant also requested the plaintiff, if A. would not come to the office, to draw his draft on the defendant for the amount of the loan, less the commission, payable to the order of A., and give the same to A. for the certificate, agreeing to hold the plaintiff harmless; and intending to have A. arrested, if the certificate should not be genuine. A. refused to go to the defendant's office, and the plaintiff gave A. his draft and received the certificate, which proved to be forged; and the plaintiff was obliged to pay the draft. *Held*, that if the plaintiff acted in good faith, he could maintain the action.

CONTRACT against the defendant, as surviving partner of the firm of C. E. Fuller and Company, on an agreement of indemnity. Writ dated February 17, 1877. At the trial in the Superior Court, before *Rockwell*, J., the plaintiff put in evidence tending to prove the following facts:

In February 1875, Marion E. Warren applied to the plaintiff to procure for her a loan of $2,000 on sixty shares of stock of the Michigan Central Railroad Company as collateral security. Warren did not show the plaintiff any certificate of stock or refer to any specific shares of stock by number of certificate or otherwise. The plaintiff, who was then a real estate and mortgage broker in Boston, and occasionally negotiated loans on personal security, applied for the loan to C. E. Fuller and Company, bankers and brokers in Boston, who told him that they would consider the application and make inquiries as to the value of the stock, and requested him to call again for an answer. On or about February 17, 1875, the plaintiff again called on C. E. Fuller and Company, and the defendant, Fuller, then informed him that, from inquiries which he had made with reference to the stock since the plaintiff had applied to him, he suspected that Warren proposed to give as collateral security a certificate purporting to be for sixty shares of the stock, but which in reality had originally represented one share, and had been raised and

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altered to represent sixty shares. The plaintiff expressed his surprise at this information, and said to the defendant that, if that were so, he should have nothing more to do with the matter. The plaintiff in fact had applied for the loan in good faith, and had had no reason theretofore to suppose that anything but a genuine certificate would be offered by Warren, and had had no complicity or connection with Warren or others in stock-raising or altering, and had had no knowledge or suspicion of the same on the part of Warren or others. The defendant then told the plaintiff that C. E. Fuller and Company were willing to make the loan asked for on a genuine certificate, and requested the plaintiff to go to Warren's residence and ask her to come with him to the office of C. E. Fuller and Company and personally receive the money on the certificate, and the defendant procured the attendance of two detectives at his banking office, and all arrangements between the plaintiff and the defendant were made in their presence. It was arranged that they were to await the return of the plaintiff and Warren with the certificate.

The defendant, suspecting that Warren would not come to the office, suggested to the plaintiff that, if she refused to come, he should draw his draft on C. E. Fuller and Company for the amount of the loan less his commission for effecting the same, payable to the order of Warren, and give the same to her for the certificate which she might offer, and bring the certificate immediately to C. E. Fuller and Company. The plaintiff hesitated, and requested time to consult counsel; but the defendant and the other member of the firm of C. E. Fuller and Company urged him, and said that they would hold him harmless against all damage and liability that might accrue from his making and delivering his draft to Warren, and thereupon the plaintiff consented. The defendant then gave the plaintiff a printed draft on C. E. Fuller and Company, with blank spaces left for the amount, and the names of drawer and payee, affixing a two-cent revenue stamp to the same, and cancelling this with C. E. Fuller and Company's office stamp before delivering it to the plaintiff, and gave him also a note for $2,000, filled out to the order of C. E. Fuller and Company, leaving a blank for Warren's signature. C. E. Fuller and Company retained from their bank deposit, as it was then about the close of banking hours, $2,000, to be paid to Warren if

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she came to get the money personally, or to meet the draft in case the plaintiff should bring from Warren a genuine certificate. It was the intention of C. E. Fuller and Company, and this they communicated to the plaintiff, in case Warren should give a raised certificate, to take measures for her immediate arrest. The value of sixty shares of the stock was then upwards of four thousand dollars.

The plaintiff proceeded to Warren's residence, and met her, after waiting till about four o'clock in the afternoon. Warren refused to go to Fuller's office, and, after some discussion between her and the plaintiff as to the amount of commissions, the plaintiff finally filled out the draft on C. E. Fuller and Company, payable to her order, for $1,964.17, and gave her the same. Warren at the same time signed the note, and a blank power of attorney, authorizing the transfer on the back of a certificate purporting to be for sixty shares of stock of the Michigan Central Railroad Company, in presence of a witness, and delivered the note and certificate to the plaintiff in exchange for the draft. The plaintiff, without examining the certificate, returned immediately to the office of C. E. Fuller and Company, arriving there a little after five P. M., but found that the members of that firm had left for the day, and had left the charge of the matter to W. C. Ellis, their clerk. At the request of Ellis, and in accordance with instructions, which he said had been given him by C. E. Fuller and Company, the plaintiff accompanied him to the office of certain detectives, for the purpose, in the first place, of submitting the certificate to them, in order to ascertain if it were really raised, in which event Ellis said his instructions from C. E. Fuller and Company were to proceed at once to arrest Warren. The detectives refused to act in the matter, and, it then being about seven o'clock in the evening, the plaintiff was obliged to go home. Ellis thereupon asked him for the certificate, in order to take it that evening to one of the firm of C. E. Fuller and Company. The plaintiff said that that was all he had to show for the draft which he had given Warren, and asked for a receipt, whereupon Ellis gave him a memorandum as follows: "Boston, February 17, 1875. Received of A. H. Holway certificate purporting to be 60 shs. Mich. Central R. R. Co., No. 27,866, in name of M. E. Warren, holding A. H. Holway harmless for

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$1,964.17, drawn this day. C. E. Fuller & Co., W. C. Ellis." The plaintiff then gave Ellis the certificate, which he the same evening delivered to one of the firm of C. E. Fuller and Company, by or for whom it has since been and now is held. The difference between the amount of the draft and $2,000 was to include a small brokerage for C. E. Fuller and Company, and the plaintiff's commission, which was to be paid by C. E. Fuller and Company in case the certificate should prove genuine, and it never was paid the plaintiff.

The next morning the plaintiff, at the request of C. E. Fuller and Company, accompanied the defendant and the other member of that firm and Ellis to the office of one Boynton, then chief of the detective force of the Commonwealth. There, the certificate being in the hands of a detective officer present, the defendant, in the presence of all the parties named, asked him to give the certificate back to him, and snatched at it, and, on the officer's refusing, insisted on having it, saying that he had given his receipt for it, and threatening legal proceedings against the officer if he did not return it. The officer thereupon handed it to Boynton, who gave the defendant a receipt for it, and Boynton at a subsequent date redelivered it to C. E. Fuller and Company. The same morning, the plaintiff and defendant discussed the transactions of the previous evening between the plaintiff and Ellis, and neither then nor in subsequent conversations had by the plaintiff with the defendant on the matter did the defendant dispute the authority of Ellis to give the receipt. The same morning the plaintiff delivered the note to C. E. Fuller and Company. In the course of the morning, a warrant for the arrest of Warren having been procured, several officers proceeded with one of the firm of C. E. Fuller and Company and the plaintiff to Warren's residence, arriving there about eleven A. M., but it was found that she had just left the house; and she was not arrested.

The plaintiff testified that, after the defendant had told him of his suspicions as to the certificate Warren would offer, he acted entirely at the request and in accordance with the directions of the defendant; that he then suspected himself that the certificate would be a raised one, but that before and at the time of the delivery of the certificate to Ellis, he had no actual knowledge that it was raised, nor has he had since; and further stated that, on

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the advice of his counsel in the suit brought against him on the draft, he had made an affidavit of defence on knowledge, information and belief, dated May 13, 1876, wherein he swore that the certificate obtained by him from Warren was forged and raised from a certificate representing one to represent sixty shares, and that at the time of making the affidavit, and since, he has believed it to have been so raised.

Subsequently Warren indorsed the draft for its face value to S. Jones and Company, bankers at St. John, N. B., who forwarded it in due course to a bank in Boston for collection from C. E. Fuller and Company, but on presentment to them they refused to pay it, and it was returned to S. Jones and Company protested. By writ dated February 18, 1876, S. Jones and Company sued the present plaintiff, declaring on the draft, in which suit the present plaintiff appeared by counsel and filed an answer. On November 21, 1876, and before trial, the present plaintiff notified the defendant and C. E. Fuller and Company of the pendency of the suit against him, and requested them to come in and defend the same, which they refused to do. On December 1, 1876, S. Jones and Company obtained a verdict against the present plaintiff for $2,180.20, being the amount of the draft and interest, and on December 28, 1876, judgment was entered, and thereupon execution issued against him in favor of S. Jones and Company on this judgment for $2,190.03 damages, and $31.25 costs of suit. The present plaintiff thereupon gave his promissory note, payable to the order of S. Jones and Company on demand, for the amount of the execution, which was returned by S. Jones and Company satisfied and discharged, and also, after commencing the present action, assigned the same and his claim against the defendant for indemnity to said S. Jones and Company as collateral security for the note. S. Jones and Company still hold the note, which has not been paid. The record in the suit of S. Jones and Company against Holway was put in evidence. The defendant in the present case objected to the admission of the record in the suit of Jones *v.* Holway, the notice of the pendency of the action and the proceedings, judgment and execution founded thereon, as in any manner relating to or binding upon the defendant in the present suit; and the judge sustained the objection.

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On the foregoing facts and evidence, the judge ruled that the plaintiff could not enforce the contract of indemnity, and that there was no evidence on which in any form the plaintiff could recover; and directed a verdict for the defendant. The plaintiff alleged exceptions.

C. H. Hill & W. S. Macfarlane, for the plaintiff, cited *Battersey's case*, Winch, 48; *S. C. nom. Fletcher* v. *Harcot*, Hutton, 55; *Merryweather* v. *Nixan*, 8 T. R. 186; *Humphrys* v. *Pratt*, 2 Dow & Cl. 288; *Adamson* v. *Jarvis*, 4 Bing. 66; *Betts* v. *Gibbins*, 2 A. & E. 57; *Dugdale* v. *Lovering*, L. R. 10 C. P. 196; *Jacobs* v. *Pollard*, 10 Cush. 287; *Babcock* v. *Terry*, 97 Mass. 482; *Greene* v. *Goddard*, 9 Met. 212; *Aldrich* v. *Ames*, 9 Gray, 76; *Washburn* v. *Pond*, 2 Allen, 474; *Day* v. *Stickney*, 14 Allen, 255.

A. V. Lynde & W. P. Harding, for the defendant, cited Met. Con. 216–219; *Shackell* v. *Rosier*, 2 Bing. N. C. 634, and cases cited; *Welch* v. *Matthews*, 98 Mass. 131; *Wheeler* v. *Russell*, 17 Mass. 259; *Libby* v. *Downey*, 5 Allen, 299; *Miller* v. *Post*, 1 Allen, 434; *Nourse* v. *Pope*, 13 Allen, 87; *Fuller* v. *Dame*, 18 Pick. 472; *Gibbs* v. *Smith*, 115 Mass. 592; *Farnsworth* v. *Hemmer*, 1 Allen, 494; *Rice* v. *Wood*, 113 Mass. 133; *Sewall* v. *Sparrow*, 16 Mass. 24; *Butts* v. *Dean*, 2 Met. 76; *Curtis* v. *Hubbard*, 9 Met. 322; *Morton* v. *Austin*, 12 Cush. 389.

Ames, J. Upon the facts stated in this bill of exceptions, it appears to us that the plaintiff had a case upon which he was entitled to go to the jury. The bill of exceptions imports that he presented the fraudulent certificate as security for a loan to his client Warren, in the regular course of his business as a broker, and that in so doing he acted in entire good faith and with no knowledge or suspicion that the certificate had been fraudulently altered. If so, we see no illegality or unfairness, either in his refusal to go on with the matter of procuring the loan, or in his consenting, after being informed of the true character of the certificate, to join in the detection of the offender, and in the attempt to bring her to justice. Certainly his duty to his client did not require him to connive at such a fraud, or to aid in its concealment or impunity.

As the plaintiff presents his case, all that afterwards passed between him and his client Warren was in pursuance of an arrangement suggested and urged by the defendant, in accordance

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with the defendant's instructions, and upon the defendant's express promise to hold the plaintiff harmless against all damage and liability that might accrue from his making and delivering his draft to Warren. The plaintiff's claim is, that, not having succeeded in prevailing upon Warren to go to the defendant's office, where it was arranged that she should be arrested, he, in pursuance of the arrangement with the defendant, took Warren's note for the amount of the proposed loan, and the certificate of the sixty shares, and gave her a draft on the defendant for the same amount, less the brokerage, the design being that Warren, on presenting the draft, should be at once arrested. Instead, however, of presenting the draft in person, Warren transferred it to another party, by whom it was forwarded in due course to a bank in Boston for collection. On its presentation to the defendant for payment, it was dishonored and protested. The holder thereupon, having given due notice to the plaintiff, brought a suit against him, and he, as he contends, has been compelled to pay the entire amount, with interest and costs.

In considering the effect of the plaintiff's exceptions in the present position of the case, it must be assumed that he is able to prove the case which he stated, and which he offered to prove. In ruling that there was no evidence on which he could recover, and directing a verdict against him, the court must be understood as taking the ground that, on the assumption that his story is true throughout, he, as matter of law, is not entitled to recover.

It appears to us, however, to be entirely a question as to his good faith, and as such is a question peculiarly within the province of the jury. If there was such a contract of indemnity by the defendant, if the draft was given to Warren in the manner and under the circumstances alleged by the plaintiff, if there was no collusion between him and the party holding the draft, and if he gave his note for the amount of the judgment in good faith and in consideration of the release of the judgment and satisfaction of the execution, it is difficult to see why he is not entitled to prevail in this suit. *Day* v. *Stickney*, 14 Allen, 255. *Washburn* v. *Pond*, 2 Allen, 474. But this is wholly a question of fact, and not of law. It should have been passed upon by the jury, under proper instructions, and not by the court.

Exceptions sustained.

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GEORGE F. HALL *vs.* DOROTHEA PEYSER.

Suffolk. Nov. 27, 1878. — Jan. 15, 1879. COLT & MORTON, JJ., absent.

In an action on a guaranty, by which the defendant guaranteed to the plaintiff the payment "of all indebtedness which A. may incur for purchase of goods, wares and merchandise" from the plaintiff, it appeared that B. had delivered goods at various times to A., to be by him manufactured for and returned to B.; that B. was to pay A. for his services in manufacturing the goods; that A did not return the goods, but converted them to his own use; that B. requested A. to return the goods, at the same time charging him with such conversion; that A. then requested B. to make a bill of the goods to the plaintiff, which he did, and the plaintiff then made a bill of the same to A.; and that this arrangement was made after the delivery of all the goods by B. to A. It was admitted by the plaintiff, that he had never had possession of the goods. *Held*, that the transaction was not a sale, within the meaning of the guaranty.

CONTRACT on the following instrument in writing, dated October 2, 1876, and signed by the defendant: "In consideration of one dollar to me paid by George F. Hall, of Boston, and for the purpose of securing a credit with him for Isidore Patterson, I hereby guarantee the full and punctual payment to George F. Hall of all indebtedness which said Isidore Patterson may incur for purchase of goods, wares and merchandise from said George F. Hall, whether such purchase shall be made on credit or otherwise, or secured by note or otherwise, without requiring notice of any kind with respect thereto. This guaranty to be an open and continuing one until revoked by notice in writing from me; it being understood that her liability thereunder shall not at any one time exceed one thousand dollars." Answer, a general denial.

At the trial in the Superior Court, before *Dewey*, J., without a jury, it was admitted that, on October 10, 1877, there was due to the plaintiff, for merchandise previously sold and delivered by him to Patterson, the sum of $53.82. The plaintiff offered evidence that, prior to October 10, the firm of Sayre & North, of New York, had delivered goods at different times to Patterson to be by her manufactured for them and returned to them; that they were to pay her for her services in manufacturing the goods; that she did not return the goods, but disposed of the same for her own use and benefit, and thereafter, about October 10, they requested her to return the goods, at the same time

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charging her with having wrongfully disposed of them for her own benefit; that she then requested them to make a bill of the goods to the plaintiff; that they did so, and the plaintiff made a bill of the same to Patterson; and that this arrangement was made after the delivery of all the goods to Patterson by Sayre & North. The plaintiff admitted that he had never had possession of the goods. These goods amounted to $576.60.

Upon this evidence the judge ruled that the plaintiff could only recover for the goods actually sold and delivered by him to Patterson; and found for the plaintiff in the sum of $53.32, and interest. The plaintiff alleged exceptions.

E. P. Brown, for the plaintiff.

W. S. Macfarlane, for the defendant.

AMES, J. The transaction described in this bill of exceptions was a mere evasion of the plain meaning of the defendant's contract. There was no sale by Sayre & North to the plaintiff. The goods never were his property, or in his possession, and he never sold them to Patterson. It was correctly ruled that the plaintiff was not entitled to recover anything beyond the charge for merchandise delivered before October 10, 1877.

Exceptions overruled.

EDWARD H. ASHCROFT *vs.* EASTERN RAILROAD COMPANY.

Suffolk. Nov. 22, 1878. — Jan. 21, 1879. ENDICOTT & LORD, JJ., did not sit.

This clause in a deed of land to a railroad corporation, "reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," operates as a reservation, and not as an exception, and vests in the grantor an estate for life only.

BILL IN EQUITY, filed June 18, 1878, alleging that, on October 26, 1837, John Lovejoy conveyed to the defendant a parcel of land in Lynn, over which its railroad has been located, consisting of a strip twenty-eight feet in width; that said parcel has ever since been owned and used by the defendant; that, by the terms of the deed, Lovejoy created and reserved, for the benefit

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of his adjoining land, an easement in the land, namely, the right to receive water from a spring by aqueduct logs, through a culvert across the land conveyed to the defendant, on to the adjoining land which was then owned by Lovejoy; that the plaintiff by mesne conveyances, had become the owner of said adjoining land and buildings of Lovejoy, for the benefit of which the easement was reserved, which easement was conveyed with the land; that Lovejoy and his grantees, including the plaintiff, have used, without interruption or objection on the part of the defendant, the culvert and aqueduct for more than twenty years prior to the acts of the defendant hereinafter complained of; that the premises belonging to the plaintiff have been used for many years for morocco and tanning business, requiring a large supply of pure water, which, prior to the acts hereinafter complained of, has always been supplied by the aqueduct running through the culvert under the railroad; that in August 1870, the defendant caused the culvert, under which the aqueduct logs were laid, to be filled with rocks and other obstructions, the weight and force of which crushed the logs, so that the water, which should have been conducted by them into and upon the premises of the plaintiff, overflowed, wasted and flooded said premises, and caused the tenant thereof to leave; that this overflow of water was adjudged by the board of health of Lynn to be a public nuisance, in consequence of which the plaintiff was obliged to lay a drain to conduct away the water at great expense; that while these obstructions were being put in, and since then, the plaintiff frequently protested to the defendant against its action, and has repeatedly notified the defendant of the interference with his easement and injury to his land, and has constantly demanded of it the restoration of his rights; but it has wholly neglected and refused to remove the obstructions and restore his rights; that, in consequence of these acts of the defendant, the plaintiff is wholly deprived of the use and enjoyment of the aqueduct and the water therefrom, and has been prevented from carrying on his business; that the defendant is insolvent and unable to pay its debts in full, and all of its property is mortgaged to creditors for a much larger sum than its value, although the defendant is still in the legal possession of the property, and it has no property which can be come at to be attached or taken

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on execution in an action at law; that the acts of the defendant are an appropriation of a privilege, right and easement appurtenant to the plaintiff's land, of a continuous and permanent nature; and that the plaintiff has not a plain, adequate and complete remedy at law.

The prayer of the bill was that the defendant might be ordered to remove the obstructions, and to restore the aqueduct to its usual and former condition; that it might be decreed to pay to the plaintiff a sum of money sufficient to compensate him for the damage done; that it might be perpetually restrained from obstructing or in any way interfering with the plaintiff's aqueduct; and for further relief.

The defendant filed a plea alleging that the reservation in the deed of John Lovejoy to the defendant, dated October 26, 1837, was in the words following, and not otherwise: "Reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company; which culvert shall cross the railroad at right angles with the southeasterly line of John Alley, 3d's, land, seventy-four feet west of the northeasterly line of my land, measuring on the centre of the railroad;" and also alleging that John Lovejoy died on September 12, 1876.

Hearing before *Ames*, J., upon the bill and plea, who reserved the question of the sufficiency of the plea for the determination of the full court.

J. P. Treadwell, for the plaintiff.

R. Olney, for the defendant.

MORTON, J. The plaintiff's right to maintain this suit depends upon the construction of the clause in the deed recited in the defendant's plea.

We are of opinion that this clause must operate as a reservation, or by way of implied grant. The operation of an exception in a deed is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant; and whatever is thus excluded remains in him as of his former right or title, because it is not granted. A reservation or implied grant vests in the grantor in the deed some new right or interest not before existing in him. Shep.

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Touchst. 80. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290.

The clause we are considering does not merely reserve to Lovejoy a right of way and of maintaining aqueduct logs through the land granted. The privilege which the parties intended should vest in him was the right of passing and repassing, and of maintaining his aqueduct logs through a culvert to be built and kept in repair by the grantee. The provision that the grantee shall build and keep in repair the culvert is an essential part of the grant, and clearly indicates that the intention of the parties was to confer upon the grantor a new right not previously vested in him, and which, therefore, could not be the subject of an exception.

It is well settled that, generally, the same rules of construction apply to a reservation or implied grant as to an express grant. In this case, the words used were, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert." This gave only an estate for life to Lovejoy. To create an estate of inheritance by deed to an individual, the land must be conveyed to the grantee and his heirs, and these necessary words of limitation cannot be supplied by other words of perpetuity. As stated by Wilde, J., in *Curtis* v. *Gardner*, 13 Met. 457, "a grant to a man to have and to hold to him forever, or to have and to hold to him and to his assigns forever, will convey only an estate for life." See also *Dennis* v. *Wilson*, 107 Mass. 591.

It is not necessary to decide whether the easement created by the reservation was appurtenant to the remaining land of Lovejoy. Assuming it to have been so, this could not have the effect to extend its duration. Lovejoy might assign it, if appurtenant, by a deed of the remaining land, but it would expire with his life, whether assigned or retained by him.

It follows from these considerations, that this bill cannot be maintained Lovejoy having died before this suit was commenced, the easement had ceased to exist, and the plaintiff is not entitled to the relief prayed for in the bill. The defendant's plea, therefore, is sufficient. *Bill dismissed.*

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ELBRIDGE CLAPP, executor, *vs.* FREDERICK W. INGRAHAM & others.

Suffolk. March 21, 1877. — Jan. 29, 1879. LORD & SOULE, JJ., absent.

If property is put in trust, the income to be paid to A. for life, and the principal, after the death of A., to his executor in trust, for the use of such person or persons as A. may by will appoint, and A. executes the power, the property appointed is deemed in equity part of A.'s assets, and subject to the demand of creditors, in preference to the claims of his voluntary appointees or legatees.

BILL IN EQUITY, filed April 21, 1876, by the executor of the will of Caroline A. Ingraham, against the children of the testatrix, and her creditors, for instructions, alleging that on January 1, 1828, the Massachusetts Hospital Life Insurance Company received from Joseph Head, trustee of Caroline A. Ingraham, wife of Daniel G. Ingraham, the sum of $3000, and executed to him an instrument in writing, whereby they promised and agreed with him, his executors and administrators, to invest the same, and to pay the income thereof quarterly to Mrs. Ingraham, "during the natural life of the said Caroline, upon her separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due; for her separate use, free from the debts, control or interference of any husband she now has, or may hereafter have; which annuity and principal sum are both hereby declared to be inalienable by the respective grantees thereof;" and further agreed with the said trustee, his executors and administrators, "that, in sixty days after proof of the decease of the said Caroline, they will assign, transfer and pay the amount of the aforesaid principal sum (or such part thereof as shall not have been lost by bad debts or otherwise, without the actual fault of said company or their servants), and all interest then due thereon at the time of her death, in real estate, stocks, notes, bonds and mortgages, belonging to said company, all, any or either of them, at the pleasure and discretion of the directors, at the prices at which the same respectively shall stand charged in the books of the company at the decease of said Caroline, in the way and manner provided in said extract from said article,

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to her executors or administrators in trust, and for the special use and benefit of such person or persons as the said Caroline by her last will and testament, or any revocable appointment in nature thereof, may direct; and if no such will and appointment be made, then to such person or persons as may be her heirs at law."

The bill further alleged, that Caroline A. Ingraham died on January 20, 1876, leaving a will, dated October 16, 1871, which was duly admitted to probate, appointing the plaintiff her executor, and containing the following clause: "I direct my said executor to receive from the Massachusetts Hospital Life Insurance Company the sum of three thousand dollars and all interest and accumulations thereon, or the real estate, stocks, notes, bonds and mortgages in lieu of said sum with interest and accumulations, which by the terms of a contract in writing between said company and Joseph Head, trustee, executed the first day of January, one thousand eight hundred and twenty-eight, the said company agrees to assign, transfer and pay to my executors or administrators in sixty days after proof of my decease; and out of the money or other property received from said company, I direct my said executor to have and keep, for his own use and benefit, the sum of four hundred dollars; and to assign, transfer and pay over all the remainder of the money, or other property received from said company, after deducting said sum for his own use and benefit, to my children and the issue of any deceased child or children by right of representation in equal shares."

The bill further alleged, that the plaintiff had received from said company the sum of $3000, and that, after diligent search and inquiry, no other property of the testatrix had come to his possession or knowledge; that the testatrix left two children surviving her, who contended that they were entitled to receive the whole of the sum remaining in the plaintiff's hands after deducting the sum of $400; that the testatrix left debts to a large amount, and that the creditors contended that said sum was liable, in the plaintiff's hands, as executor, for the payment of such debts.

The children of the testatrix and certain of the creditors filed answers, admitting the allegations of the bill, and setting up

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their respective claims; and the case was heard by *Morton*, J., upon the bill and answers, and reserved for the consideration of the full court.

T. P. Proctor, for the creditors.

G. M. Hobbs, for the children.

GRAY, C. J. It was settled in the English Court of Chancery, before the middle of the last century, that where a person has a general power of appointment, either by deed or by will, and executes this power, the property appointed is deemed in equity part of his assets, and subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees. The rule perhaps had its origin in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate. *Thompson* v. *Towne*, Prec. Ch. 52; *S. C.* 2 Vern. 319. But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and, while recognizing the logical difficulty that the power, when executed, took effect as an appointment, not of the testator's own assets, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meagre and imperfect reports have come down to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his executors if he pleased, and, if he executed it voluntarily and without consideration, for the benefit of third persons, the money should be considered part of his assets, and his creditors should have the benefit of it. *Townshend* v. *Windham*, 2 Ves. Sen. 1, 9, 10. *Ex parte Caswall*, 1 Atk. 559, 560. *Bainton* v. *Ward*, 7 Ves. 503, note; *S. C.* cited 2 Ves. Sen. 2, and Belt's Supplt. 243; 2 Atk. 172. *Pack* v. *Bathurst*, 3 Atk. 269. The doctrine has been upheld to the full extent in England ever since. Chance on Powers, *c.* 15, § 2. 2 Sugden on Powers (7th ed.) 27. *Fleming* v. *Buchanan*, 8 DeG., M. & G. 976.

Although the soundness of the reasons on which the doctrine

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rests has been impugned by Chief Justice Gibson, *arguendo*, and doubted by Mr. Justice Story in his Commentaries, the doctrine is stated both by Judge Story and by Chancellor Kent as well settled; and it has been affirmed by the highest court of New Hampshire, in a very able judgment, delivered by Chief Justice Parker, and applied to a case in which a testator devised property in trust to pay such part of the income as the trustees should think proper to his son for life, and, after the son's death, to make over the principal, with any accumulated income, to such persons as the son should by will direct. *Commonwealth* v. *Duffield*, 12 Penn. St. 277, 279–281. Story Eq. Jur. § 176 and note. 4 Kent Com. 339, 340. *Johnson* v. *Cushing*, 15 N. H. 298.

A doctrine so just and equitable in its operation, clearly established by the laws of England before our Revolution, and supported by such a weight of authority, cannot be set aside by a court of chancery, because of doubts of the technical soundness of the reasons on which it was originally established. It is true that, as the rights of the creditors could only be enforced in a court of chancery, they were remediless so long as no adequate equity jurisdiction existed in this Commonwealth. *Prescott* v. *Tarbell*, 1 Mass. 204. But such a consideration affects the remedy only, and not the right, and affords no reason for denying the right now that this court, sitting in equity, has been vested by the Legislature with ample powers to maintain and protect it. Gen. Sts. *c.* 113, § 2. *Rogers* v. *Ward*, 8 Allen, 387, 390.

By the instrument of trust in the case before us, an annuity was payable quarterly to Mrs. Ingraham during her life, and the principal after her death to her executor or administrator in trust and for the special use and benefit of such persons as she by her last will, or by any revocable appointment in the nature thereof, might direct, and if no such will or appointment should be made, then to her heirs at law. The only restrictions expressed are, that the annuity during her life is to her separate use, free from the debts or control of her husband, and each instalment thereof is to be paid upon her order when or after it has fallen due, so that she would have no right to assign it by way of anticipation; *Perkins* v. *Hays*, 8 Gray, 405; and that the annuity and the principal are both declared to be "inalienable

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by the respective grantees thereof," — which clearly has no application to the general power of appointment, conferred upon her by the express terms of the trust, to dispose of the principal, after her death, by will or testamentary instrument in the nature thereof; and, she having exercised the dominion so granted to her, the property is thus brought within the equitable doctrine which makes it subject to her debts.

We are aware that it has been held by Vice Chancellor Kindersley, and by Lord Romilly, M. R., that the doctrine does not extend to the case of the execution of a general power by a married woman, without fraud. *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 363. *Blatchford* v. *Woolley*, 2 Dr. & Sm. 204. *Hobday* v. *Peters*, 28 Beav. 354. *Shattock* v. *Shattock*, L. R. 2 Eq. 182; *S. C.* 35 Beav. 489. We need not consider whether those cases were well decided, or are applicable in this Commonwealth, where, by statute, every married woman has long been liable to be sued, and her property taken on execution, upon contracts made by her for her own benefit, and, since 1874, upon all her contracts with any person but her husband. Gen. Sts. *c.* 108, §§ 1, 3. St. 1874, *c.* 184. *Willard* v. *Eastham*, 15 Gray, 328, 334. *Major* v. *Holmes*, 124 Mass. 108. It is quite clear that, even in England, all restrictions on her capacity and liability would terminate with her coverture. *Tullett* v. *Armstrong*, 1 Beav. 1, 32, and 4 Myl. & Cr. 377, 395 *& seq.* And in the present case it does not appear, and has not been contended, that Mrs. Ingraham continued to be a married woman at the time of contracting the debts in question, or of exercising the power.

In *Nichols* v. *Eaton*, 91 U. S. 716, and in *Durant* v. *Massachusetts Hospital Life Ins. Co.* 2 Lowell, 575, the settlement differed from that before us in expressly providing that the property should not be subject to the debts of the *cestui que trust*, and in giving no general power of appointment; and there is nothing in the decision or opinion, in either of those cases, that is adverse to the claims of creditors in the case at bar.

Decree for the creditors.

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ELIZA A. BLANEY *vs.* JOHN H. BLANEY.

Suffolk. Nov. 12, 1878. — Jan. 28, 1879. COLT, MORTON & SOULE, JJ., absent.

Evidence that a husband had been grossly intoxicated as often as three or four times a year for a period of twelve or fifteen years, and remained in that condition from seven to ten days on each occasion; that at such times he went or was sent to an asylum for inebriates; that when the desire for drink came upon him he could not resist; that a single glass of liquor would bring on excessive drinking and a renewal of gross intoxication; that there had been no apparent improvement in his habits in this respect; and that any undue excitement made him drink, is sufficient to justify a finding that he had contracted such gross and confirmed habits of intoxication as entitled the wife to a divorce, under the St. of 1870, c. 404.

LIBEL for divorce from the bond of matrimony, filed October 20, 1877, alleging that the libellee had contracted gross and confirmed habits of intoxication.

At the hearing, before *Colt*, J., it appeared that the libellee was a person who, for a period of twelve or fifteen years last past, not exceeding three or four times a year, became grossly intoxicated, and on each of these occasions remained in that condition from seven to ten days; and that on such occasions he went or was sent to the Washingtonian Home in Boston. Albert Day, the superintendent and physician at that institution, testified that the libellee had been under his charge for years past, and had been benefited while there; that he considered him as belonging to a class of inebriates which he designated as periodical drunkards; that such a man could not resist when a desire for drink came upon him; that a single glass would bring on excessive drinking with him, and a renewal of his gross intoxication; that many of that class of drunkards are cured of their propensity by utterly abstaining from intoxicating drink; that the occurrence of these spells becomes less frequent as the patient grows older; and that between the spells the patient will drink nothing. It further appeared, that from December 1876, to February 1878, the libellee had had five drinking spells; and that any undue excitement made him drink.

Upon this evidence, the libellee requested the judge to rule,

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as matter of law, that the charge in the libel was not sustained. But the judge ruled otherwise, and found, as a fact, that the libellee had contracted such gross and confirmed habits of intoxication as entitled the libellant to a divorce. The libellee alleged exceptions.

F. C. Welch, for the libellee.

I. H. Wright, for the libellant.

AMES, J. The statute which makes gross and confirmed habits of intoxication a ground of divorce does not undertake to define those terms, and they probably do not admit of precise definition. It does not point out how long continued or how frequent the intoxication must be to be pronounced habitual, or to what extreme it must be carried to be properly described as gross. St. 1870, *c.* 404. The evidence reported in this bill of exceptions is to the effect that the libellee, for a period of twelve or fifteen years, had as often as three or four times a year yielded to an impulse to drink to excess; that on such occasions he became grossly intoxicated, continuing in that condition a week or ten days together; and that at such times he went or was sent to an asylum for inebriates; that when the desire for drink came upon him, he could not resist, and that a single glass would bring on excessive drinking, and a renewal of gross intoxication. It was also shown that there had been no apparent improvement in his habits in this respect, and that any undue excitement would make him drink. Upon this evidence, the judge was justified in his finding; or, to say the least, it is impossible for us to say, as matter of law, that his finding was erroneous.

Exceptions overruled.

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THEODORE L. SAVAGE *vs.* SEYMOUR W. STEVENS.

Suffolk. Nov. 18, 1878. — Jan. 28, 1879. COLT & MORTON, JJ., absent.

In an action for false and fraudulent representations, whereby the plaintiff was induced to buy an estate in another state, it appeared that the defendant made representations to the plaintiff in relation to the situation of the estate, and the condition and character of the buildings upon it; that, before the exchange of the deeds, the defendant told the plaintiff that he had never seen the estate; and that, after the exchange of the deeds, the plaintiff went for the first time to see the estate, and found that all of the representations made by the defendant were false. *Held*, that it was no defence that the defendant had not seen the estate; and that whether the plaintiff was negligent in not visiting the estate was a question for the jury.

TORT for false and fraudulent representations made by the defendant, whereby the plaintiff was induced to exchange an estate in Boston for an estate in Tamworth, New Hampshire.

At the trial in the Superior Court, before *Rockwell*, J., the plaintiff introduced evidence tending to show that the estate in Boston was valued at $6000, subject to a mortgage of $4000; that the defendant represented to the plaintiff that the estate in Tamworth was located only two and a half or three miles from Ossipee Centre, that it consisted of forty acres of land in a good state of cultivation, that there was a house built thereon within five or six years, and a good barn upon the land, that the taxes assessed for that year amounted to $100, and that there was an insurance policy for $1000 upon the house; that, before the exchange and delivery of the deeds, the defendant told the plaintiff that he had never seen the Tamworth estate, and referred the plaintiff to three other persons, some of whom made substantially the same statement; that, after the deeds of exchange were passed, the plaintiff went for the first time to Tamworth, and found that the land was sterile, that there were no fences, that there was an old barn nearly gone, that the house was probably one hundred years old, and was greatly dilapidated, without whole windows or doors, and that the taxes were less than $3, according to a tax bill admitted in evidence; that the defendant never produced any insurance policy, but said there was one for $1,000, but it was of no use to transfer it as it expired soon; and that the estate was situated eighteen miles from Ossipee Centre.

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The judge directed a verdict for the defendant, on the ground that there was no evidence to sustain the action, because the plaintiff could have ascertained, by visiting the estate and by means accessible to him, what the truth was; there being no evidence that the defendant by any act or statement discouraged or prevented him from making full examination of every particular. The plaintiff alleged exceptions.

B. E. Perry & S. W. Creech, Jr., for the plaintiff.

W. P. Harding & A. V. Lynde, for the defendant, cited *Thom* v. *Bigland*, 8 Exch. 725; *Medbury* v. *Watson*, 6 Met. 246, 259; *Brown* v. *Castles*, 11 Cush. 350; *Gordon* v. *Parmelee*, 2 Allen, 212; *Hemmer* v. *Cooper*, 8 Allen, 334; *Mooney* v. *Miller*, 102 Mass. 217; *Tucker* v. *White*, 125 Mass. 344.

ENDICOTT, J. We are of opinion that this case should have been submitted to the jury. The representations made by the defendant in relation to the situation of the farm, and the condition and character of the buildings, were of material facts, affecting the value of the property, and were not expressions of opinion merely. Where a vendor makes such representations, as of his own knowledge, respecting the property he proposes to convey, and they are false, he is liable to the vendee who relies and acts upon the statements as true; and if not made as of his own knowledge, yet, if he knows them to be false, he is equally liable. It was therefore no conclusive answer in this case that the defendant had not seen the farm in New Hampshire. *Litchfield* v. *Hutchinson*, 117 Mass. 195. It is true that a person to whom such representations are made has no right to rely upon them, if the facts are within his observation, or if he has equal means of knowing the truth. But if the facts are not known to him, and he has not equal means of knowing the truth, and can rely upon the statements made to him without imputation of negligence, then, upon discovering them to be false and fraudulent, he may maintain an action. *Manning* v. *Albee*, 11 Allen, 520. In the case at bar, the farm respecting which the representations were made was situated in Tamworth, New Hampshire, far distant from the place of the bargain. No certain knowledge could be obtained by the plaintiff respecting it, except by visiting the estate. Negligence cannot be imputed to the plaintiff, as matter of law, in failing to visit a

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place so distant; and whether he was negligent, in fact, in not doing so, was a question for the jury upon all the evidence in the case. *Exceptions sustained.*

GLOBE NATIONAL BANK *vs.* SAMUEL INGALLS & others.

Suffolk. Nov. 19, 1878. — Jan. 28, 1879. COLT & MORTON, JJ., absent.

In an action by a bank on a promissory note, to which the defence was payment by a sale of bonds of a corporation held as collateral security, parol evidence was admitted, against the defendant's objection, to show that the bank held the bonds also as collateral security for a previous note, of which the note in suit was a renewal or was given as security, and that, having a claim against the bankrupt estate of an indorser of the previous note, the bank made an arrangement with the assignee in bankruptcy, by which the bonds were sold by public auction, the bank agreeing to bid a certain amount for them, and to prove the balance of the claim against the estate; that no one else bid any more, and the bank kept the bonds and proved the remainder of its claim. *Held*, that this evidence was admissible. *Held, also*, that the fact that the bank received a dividend from the trustees of the property of the corporation, to whom a mortgage had been given to secure the bonds, was not evidence tending to show that the bonds were actually sold by the bank.

CONTRACT upon a promissory note for $1045.75, dated April 27, 1876, payable six months after date to the order of Charles J. Sprague, cashier, and signed by the Winthrop Horse Railroad Company and by the defendants. Ingalls only appeared. Answer, a general denial, with allegations of payment of a note, for which this was given as collateral security.

At the trial in the Superior Court, before *Dewey*, J., the plaintiff put in evidence the note declared upon, and rested his case, agreeing that the sum of $52.18 should be allowed on the note, on account of a dividend received from the estate of Saunders, one of the indorsers of the original note, of which the note in suit was collateral security or a renewal, and also that the sum of $115.80 should be allowed on account of moneys received from O. A. Taft, who was the trustee named in the mortgage by which the bonds of the Winthrop Horse Railroad Company were secured.

It was agreed that the bonds of this railroad company, to the

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amount of $9000, had been pledged to the plaintiff bank as collateral security for a note of $4000, and two notes of $1000 each, and that in payment thereof, or in renewal, new notes were given, of which the note in suit was one.

The defendant contended that the $9000 of bonds, given as collateral security, had been on March 14, 1876, sold by and purchased by the bank at twenty per cent of their par value, amounting to $1800, and that a portion of this sum, if there was a sale, (one ninth as admitted by the plaintiff, or one half as contended by the defendant,) should be allowed on the note in suit. The defendant put in evidence tending to show a sale of the bonds and a purchase thereof by the bank. The plaintiff contended that there had never been any real sale of the bonds; that all that was done in relation to a sale of the same was under an agreement made between the assignee in bankruptcy of Saunders, who was one of the indorsers of the original notes secured by the bonds, and the president of the plaintiff bank, and was for the purpose of agreeing on some amount which should be allowed as the value of the collateral security on the notes as against Saunders, so that the bank might prove for the balance against Saunders's estate in bankruptcy, and that the bank agreed with the assignees to call the value of the bonds twenty per cent of their par value, if no one offered more for them, and that they were, after being advertised, bid off for that amount to the brother of the president of the bank; but, although bid off, that there was no sale, and no delivery was ever made of said bonds, or any sum paid for them, and that the bonds had never been out of the possession of the bank.

O. A. Taft testified that he was trustee of the bonds of the Winthrop Horse Railroad Company, and had sold all the property, stables, cars, buildings, horses, etc., held by him under the mortgage securing these and other similar bonds, excepting five eighths of a mile of track in East Boston; and had received therefor $2470, from which amount he had paid the plaintiff the proportionate amount of the receipts as holder of the bonds.

One of the assignees of the estate of Saunders testified that the plaintiff bank proved against the estate of Saunders three notes made by the Winthrop Horse Railroad Company, two of the notes being for $1045 each, indorsed by Saunders, and dated

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April 22, 1875, and May 1, 1875; that on these notes the estate paid $6\frac{23}{100}$ per cent, that is, on all above twenty per cent of the claim which was proved as secured to that amount. The plaintiff on cross-examination asked this witness whether it was not true that the question came up as to how much these bonds were valued at, in reference to proving the balance against the estate. The defendant objected to evidence of any conversation between the witness and his associates, or between the witness and the president of the bank, unless the conversation was in the presence of the defendant. The judge ruled that the plaintiff might show the real nature of the transaction; and, against the defendant's objection, the witness testified, that he made the arrangement with the president of the plaintiff bank, as to how much the bank should be allowed to credit on their claim, before proving on the balance; that the arrangement was that these bonds should be put up at public auction, the bank guaranteeing beforehand to make a bid of twenty cents on a dollar; that, if no one else bid any more, the bank was to apply that credit as common creditors; that the purpose was to ascertain a balance to prove against the Saunders estate.

The president of the plaintiff bank testified, that the bank received $9000 worth of Winthrop Horse Railroad Company's bonds as security for a loan of $6000; that these bonds had never been out of the bank's possession; that the bonds were put up by auction on March 14, 1876, and, although they were bid off, it was not a sale; and that no money ever passed.

The question as to whether there had been any sale of the railroad bonds was submitted to the jury, under instructions from the judge not objected to, except as hereafter stated, with the directions that, if they found there had been a sale of the bonds, they should allow on the note in suit, in addition to the $52.18 and $115.50 above mentioned, the sum of $200 or $900 as they found the bonds were held as collateral security for $6000 or for $2000.

The defendant requested the judge to rule that the fact of Taft's paying the bank the amount received from the sale of the security of the bonds was evidence tending to show a *bona fide* sale of the bonds to the plaintiff. The judge declined to rule as requested, stating to the jury that, if the plaintiff held the bonds as collateral security, it would be proper for them to receive any

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payment thereon, and that from the fact of the receipt of said payment no inference could be drawn as to whether they held the bonds as collateral security, or as the owners thereof.

The jury returned a verdict of $803.52 for the plaintiff; and the defendant alleged exceptions to the refusal of the judge to rule as requested.

E. C. Gilman, for Ingalls.

J. W. Hubbard, for the plaintiff.

AMES, J. At the trial, the defendant offered evidence tending to show a sale of the bonds and a purchase of them by the bank. The plaintiff denied that there had been any such sale, and contended that all that had been done in relation to the sale of the bonds was under an agreement between the bank and the assignees in bankruptcy of Saunders, one of the indorsers of the notes, for the purpose of determining upon some amount which should be treated as the value of the bonds that had been left as collateral security for the original loan, in order that the plaintiff might prove its claim for the balance against the estate of the bankrupt. The plaintiff introduced evidence to the effect that there had been no actual sale, and that the bonds had never been transferred, or out of its possession. And the plaintiff, against the defendant's objection, was permitted to show the real nature of the transaction, by proof of the particulars of the arrangement with the assignees, and that in fact it was an unsuccessful attempt to sell the bonds at auction. We find no error on the part of the court in admitting this evidence. An oral agreement could hardly be proved at all, except by evidence of what was said.

It appeared that the plaintiff had received, from the trustee to whom the property of the railroad corporation had been mortgaged to secure the payment of its bonds, certain sums of money arising from the sale of a portion of that property, which sums the plaintiff offered to allow on this trial in part satisfaction of its claim. The defendant requested the court to rule that the receiving of this payment from the trustee was evidence tending to show a previous *bona fide* sale of the bonds to the bank. This ruling the court refused to give, and we find no error in this refusal, or in the ruling that was given. The plaintiff, whether it held the bonds as collateral security or as absolute owner,

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might properly receive any payment that should be made thereon. The fact of receiving such payment therefore furnishes no ground for any inference whatever as to the question in which of those two capacities or relations it acted in so doing.

Exceptions overruled.

MARY D. BARRETT *vs.* JULIA M. MARSH.

Suffolk. Nov. 19, 1878. — Jan. 28, 1879. COLT & MORTON, JJ., absent.

The will of a testator, whose wife and two daughters survived him, and whose real estate consisted of a parcel of land containing about 25,000 square feet, on which was a house, which he had long occupied as his home, contained the following provisions: "1. I give my wife all the furniture and house situated in B. 2. I give my wife one half of my other real and personal estate. 3. It is my desire that the other half should be divided equally between my two daughters. 4. I wish my wife and daughters to receive an income from all my real and personal estate during their natural lives after they have got their portions. 5. I wish my wife when she dies to give her property and money to my daughters. 6. It is my desire that my property of whatever kind should, after the decease of my wife and daughters, descend to the children of my daughters respectively if they are married." The wife of the testator never conveyed said real estate, or any part thereof, and, by her will, gave the residue of her estate, which included the land in question, to her two daughters equally. *Held*, that the devise in the first clause of the will of the testator was sufficient to convey a title in fee to the house and the land belonging to it; that, even if any portion of the land did not pass by this clause, the second and third clauses of the will would vest in the widow in fee one half of all his real estate not included in the first clause, and the other half in the two daughters of the testator, also in fee; that this fee was not qualified or rendered subject to a trust by the subsequent clauses of the will; and that the two daughters, by the will of their father and that of their mother, became owners in fee, as tenants in common, of the real estate.

BILL IN EQUITY, filed July 19, 1878, for specific performance of an agreement, signed by the plaintiff and the defendant, whereby the plaintiff agreed to sell and the defendant to buy an undivided half part of a certain parcel of land in that part of Boston formerly Brighton, containing about 25,000 square feet, the land to be conveyed in fee, free from all incumbrances, by a warranty deed, for the sum of $4000, of which $1000 was to be paid in cash, and for the remainder the defendant was to give her promissory note, payable in three years, and secured by a mortgage on the land.

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The bill alleged a tender of the deed, duly executed, to the defendant, and a refusal by her to accept the same, on the pretext that the plaintiff had not an estate in fee in the land.

The bill also alleged, that the deed would give the defendant a good title free from all incumbrances; that the premises described in the agreement and deed were the same of which Charles Barrett, in April 1862, died seised and possessed, leaving no other real estate or interest in real estate except certain mortgages which he held, and leaving as his only issue two daughters, the plaintiff and the defendant, and also leaving a widow, Abby B. Barrett; that Charles Barrett at the time of his death resided, and for some years before had resided, in the house on said land, and all of said land at the time of his death was used, and for some years before had been used, as a part of his home; that his last will, dated in August 1853, which was duly proved and allowed on June 10, 1862, contained the following provisions:

"1. I Chs Barrett give my beloved wife Abby B. Barrett all the furniture and house situated in Brighton.

"2. I C. Barrett give my beloved wife A. B. Barrett one half of my own other real and personal estate.

"3. It is my desire that the other half should be divided equally between my two beloved daughters Julia Maria Barrett and Mary Darracott Barrett.

"4. I Cha. Barrett wish my beloved wife and daughters to receive an income from all my real and personal estate during their natural lives after they have got their portions.

"5. I C. Barrett wish my beloved wife when she dies to give her property and money to my daughters.

"6. It is my desire that my property of whatever kind should, after the decease of my wife and daughters, descend to the children of my daughters respectively if they are married."

The bill also alleged that, on November 24, 1877, Abby B. Barrett died, not having been married again, and not having conveyed said land, leaving, as her only issue, her two daughters, the plaintiff and the defendant; that by her last will, duly approved and allowed on December 17, 1877, she left all the residue of her property real and personal, including the land in question, to her two daughters, to be equally divided between them; that,

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by virtue of the above wills, the plaintiff became seised and possessed in fee of one undivided half part of said land and the buildings thereon.

The answer admitted the truth of the facts alleged in the bill; and denied that the plaintiff was seised in fee of one undivided half part of said land.

The case was heard by *Ames*, J., on the bill and answer, and reserved for the consideration of the full court.

J. H. Bradley, for the plaintiff.

J. D. Ball, for the defendant.

AMES, J. It is easy to see that the will of Charles Barrett, upon which the rights of these parties depend, was not the work of an accomplished conveyancer. To some portions of it, it is not easy to attach any definite meaning. But the intent of the testator, as gathered from the will taken as a whole, furnishes the true rule for its construction. *Gifford* v. *Choate*, 100 Mass. 343. However awkwardly expressed, we think that intent is sufficiently certain to be carried into effect.

The first clause in the will contains a devise of "the house situated in Brighton" to Abby B. Barrett, and this devise is expressed in terms which in the construction of wills have always been considered sufficient to convey a title in fee. There can be no doubt that a devise or conveyance of a house passes as incidental to the grant the land belonging to it, used with it, and essential to its use and enjoyment. But if there can be any room to suppose that a narrower construction is to be applied, and that any portion of the house lot was not included in that clause, the second and third clauses of the will would operate to vest in Abby B. Barrett, in fee, one half of all real estate of the testator not included in the first clause, and the other half in the two daughters of the testator, also in fee. In either event, and upon either construction of these three clauses, the two daughters, under the will of the father and that of the mother, would be the owners in fee, as tenants in common, of the house in Brighton and the entire lot of land described in the bill, unless the subsequent clauses require a different construction

It is insisted on the part of the defendant that the devises contained in the previous clauses are qualified by the fourth and also

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by the sixth. But we find nothing in the fourth in conflict with those that precede it, and, it may be added, very little that is really distinct and intelligible. With regard to the fifth and sixth clauses, it may be enough to say that it is not every expression of a wish in the interpretation of a will that is to be construed as a command, or as the creation of a trust. In order to have such an effect, it must appear that the words used were intended by the testator to be imperative. The previous clause gave the property absolutely and without restriction, and a trust is not lightly to be imposed, upon mere words of recommendation and confidence. *Hess* v. *Singler*, 114 Mass. 56. 1 Perry on Trusts, § 115. 2 Story Eq. Jur. § 1070. The fifth clause merely expresses a wish that the testator's widow, at her death, shall make an equal division of her estate among the children, but does not purport to give them any legal or equitable estate. It looks to a disposition to be made by her at her death. *Sears* v. *Cunningham*, 122 Mass. 538. A general intent, clearly expressed in a will, is not to be defeated by the addition of equivocal language, or expressions of doubtful or uncertain meaning. *Williams* v. *Bradley*, 3 Allen, 270. To give to the sixth clause the effect contended for by the defendant would require that the terms in which the testator had expressed his primary purpose should be deprived of their legitimate and universally recognized import. *Ladd* v. *Whitney*, 117 Mass. 201.

From this view of the case, it follows that there must be a

Decree for the plaintiff.

Attorney General *vs.* James O. Parker.

Middlesex. Jan. 18, 1878.—Jan. 2, 1879. Colt & Endicott, JJ., absent.

A testator by his will left a sum of money to a town, the principal of which was to be managed by a board of trustees named in the will and their successors in office, all of whom, except one, were to be chosen by the remaining members of the board, and he was to be chosen by the town. The income of the fund was to be applied to the support of a high school for the benefit of the youth of the town, under the superintendence of the trustees, the town having the right to examine into the state of the school, and of the fund, and of the doings of the trustees. An information in equity, filed by the Attorney General at the

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relation of a committee appointed by the town, against one of the trustees, alleged that he had been appointed treasurer by the other trustees, and had acted as such for several years; that, on another trustee being appointed treasurer, the defendant refused to pay a part of the funds to the new treasurer, and refused to make known to the board the amount in his hands, or the manner of investment, and to apply any part of it to the purposes of the trust. *Held*, on demurrer, that a failure to make "due application of funds given to public charities," within the Gen. Sts. *c.* 14, § 20, was sufficiently alleged; but that all the other trustees from the beginning of the trust, and, *it seems*, the town, should have been made parties defendant.

INFORMATION IN EQUITY by the Attorney General, at the relation of a committee of the town of Shirley. The defendant demurred to the information. The case was heard by *Soule*, J., on the information and demurrer, and reserved for the determination of the full court; and appears in the opinion.

T. H. Sweetser & F. A. Worcester, for the defendant.

D. S. Richardson, for the Attorney General.

SOULE, J. It appears from the information and the papers annexed thereto that Leonard M. Parker gave by his will "the sum of four thousand dollars to the inhabitants of the town of Shirley, to constitute a fund for the endowment and support of a high school for the benefit of all the youth of the town, the same to be placed under the superintendence" of certain persons named in the will, "as a board of trustees." This board, originally composed of six persons, was to consist, after five years, of five only, one going out of office at the end of each of the first four years after the organization of the board, and the other two at the end of the fifth year, the vacancies to be filled by the board, except one, which was to be filled by election by ballot by the town at a meeting called for the purpose. The board was to be organized by the choice of a chairman and secretary, and was authorized by the will to make choice of all other necessary officers, appoint teachers, and fix their compensation, determine the age, number and qualification of the pupils of the school, "and do all things needful," and was required to keep a record of its doings, and to make a report annually to the town, showing the condition of the school, the state of the fund, and the manner in which the income had been expended or invested. The board was also authorized to procure an act of incorporation with all needful powers to carry the will into effect, and "for the most effectual investment of the funds to insure to the town

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their safety." The will further provided, that the principal of the fund and its accumulations should always be held sacred to the object specified; and that the income should be received and faithfully appropriated to the purposes mentioned; that "the town shall have the right, at all times, to examine into the state of the school, and of the fund, and the doings of the trustees, and to hold them to a faithful accountability." The trustees were never incorporated, and when the information was filed there was one vacancy in the board, which consisted of but four members. By a codicil, certain changes were made in the bequest, but they have no bearing on the questions before us.

The information sets forth, and the demurrer admits, that the trustees accepted the trust and elected the defendant secretary and treasurer of the board in the year 1855, and thereafter annually till the year 1872, when Seth Chandler, another member of the board, was elected secretary and treasurer; that the defendant received large sums of money and the proceeds of the sale of lands, for the purposes of the trust, and had the custody, management and investment thereof, and of the proceeds and income thereof, till the election of Chandler as treasurer; that there still is a balance in his hands, as it is believed, of five or six thousand dollars; that the defendant refuses to furnish any account of the condition of the investment of the funds in his hands, or of the income thereof, or to pay any part of it to Chandler, or apply it to the purposes of the trust; and that the board and Chandler have often demanded an account of the proceedings of the defendant as treasurer, and of the investments of income and expenditures by him. The information charges that, through the conduct of the defendant, there is danger that the fund will be wholly lost to the town and to the beneficiaries intended by the will, and asks for an account of the trust funds which he has received, from the beginning, and of all the earnings and income which he has or ought to have received, and of his lawful expenditures of the same, and of its condition and investment; and that he be ordered to pay any balance in his hands to Chandler, or such other persons as the court may order, and generally for other and further relief. The information is brought at the relation of three citizens of

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Shirley, "a committee of said town chosen to collect and act upon the funds."

The defendant demurs to the information on four grounds: First. That it does not allege a breach of trust on the part of the defendant in the application of the funds, and that it is only in case of a misapplication of funds that the Attorney General is authorized to prosecute. Second. That the town of Shirley is not made a party. Third. That the co-trustees of the defendant are not made parties. Fourth. That the ex-trustees, whose terms of office have expired, are not made parties.

As to the first ground of demurrer, it is sufficient to say that the information alleges a refusal to pay a part of the funds to the treasurer of the board, a refusal to make known to the board the amount in the defendant's hands, or the manner of its investment, and a refusal to apply the income or any part of it to the purposes of the trust, which is a sufficient failure to make "due application of funds given to public charities," within the meaning of the Gen. Sts. *c.* 14, § 20, to authorize the filing of an information. But, in saying this, we are not to be understood as intimating that the right and duty, incident on general principles to the office of the Attorney General, or public prosecuting officer, to interfere in behalf of the proper administration of public charities, is diminished or narrowed by that statute. See *Parker* v. *May*, 5 Cush. 336.

The prayer for relief in the information is so broad as to require an investigation of the whole management of the trust fund from the beginning to the time of the election of Chandler as treasurer, in 1872. It may involve an inquiry into the propriety of investments which have proved disastrous, and of expenditures which become the subject of objection. For all these matters, the trustees for the time being are jointly responsible. The acts of the treasurer, who is an officer of their own creation, for their own convenience in the transaction of business, are their acts, and no proper investigation can be had without making them parties to it. Any decree which might be made adverse to the defendant under this information would not be binding on them, nor prevent further litigation against him at their instance, nor against them at the instance of the Attorney General. In accordance with the general principle that all persons interested

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should be made parties to proceedings in equity, and that the want of such parties is good ground for demurrer, we are of opinion that the demurrer is well taken on the third and fourth grounds stated.

The will names the town of Shirley as the donee of the fund, but also directs that the fund be placed under the superintendence and direction of certain trustees, named, who are to have the power to invest it, and receive and expend the income, as well as to manage the school which is to be supported out of it, and are to fill all the vacancies in their own number, except one, which is to be filled by the town. Ordinarily, when a legacy is given to an individual, to be held by trustees, who are to pay the income to that individual, the legal ownership is in the trustees, and the rights of the beneficiary are equitable only. We think that the same principle applies here. The powers given to the trustees, as above stated, together with the further authority to apply for an act of incorporation, for the safer holding and management of the fund, are not consistent with the idea that the town was to be the owner of the legal title to the money. The fact that the trustees who were to take the property are named in the will, indicates the intention of the testator that the title to the land given for the charity should vest in them; and there is no necessity for holding, as in *Drury* v. *Natick*, 10 Allen, 169, that the town took the fee. In that case the trustees were not named in the will, but were to be elected by the town.

Nor is the town made a visitor of the charity, in the ordinary meaning of that term. The visitor of a charity, in case the fund is held by an eleemosynary corporation, has the power and duty to hear and determine all differences of the company among themselves, and generally to superintend the internal government of the body, taking as his guide the rules laid down by the founder, and, so long as he does not exceed his province, his decision is final. 2 Perry on Trusts, § 742. The authority which belongs to a visitor of a charitable corporation is given by this will to the trustees. They have absolute control of the management and government of the school and of the fund, so long as they do not violate the rules of law with reference to the management of the property. If they had obtained an act of

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incorporation, pursuant to the authority so to do contained in the will, as trustees of that corporation, they would have had all the powers which belong to visitors.

It appears, however, from inspection of the will, that the testator had in mind a benefit to the town, in creating this charity, and, with this in view, required that the trustees should make report annually to the town of the state of the fund and of the school, and the manner in which the income had been expended, and authorized the town to examine into the doings of the trustees, and hold them to a strict accountability. But it is clear that the town, as a municipality, is not directly benefited by the gift. No part of the principal, no part of the income of the fund, goes into its treasury; and it has no control over its investment or expenditure. Indirectly, however, it is a beneficiary. The fund is intended to aid in educating the children of the inhabitants of the town, without distinction. It will to some extent relieve the inhabitants from the burden of taxation likely to fall on them in the endeavor, almost universal in towns in this Commonwealth, to furnish to the children a higher education than can be obtained in the common schools, as distinguished from high schools. In this indirect way the town is beneficially interested in the charity, and to such a degree that it might, if there were no other trustees, be appointed to act as trustee of this charity. *Webb* v. *Neal*, 5 Allen, 575. The town, therefore, is a proper, if not a necessary, party to a suit which involves a full investigation of the management of the trust.

It is contended, however, that the town is already a party, because the information is brought at the relation of a committee of the inhabitants chosen to collect and act upon the fund. This position is not tenable. The relators are not parties to the suit; they have no interest in the matter as to which they seek for relief; they cannot be heard by counsel nor in person. They are important to the proceedings, merely that there may be somebody responsible for costs in case it should appear that the information is unfounded. *Attorney General* v. *Butler*, 123 Mass. 304. *Attorney General* v. *Barker*, 4 Myl. & Cr. 262. This suit is brought by the Attorney General in his official capacity, for the sole purpose of inquiring into and remedying an alleged diversion of the fund from the charity for which it was

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created. The proceeding is an information purely. As it does not immediately affect the rights of the Commonwealth, the prosecuting officer depends on the relation of persons whose names are inserted in the information as relators, and, as the suit is carried on under their direction, they are regarded as answerable to the court for the propriety of the suit and for the conduct of it. "It sometimes happens," says Lord Redesdale, "that this person," the relator, "has an interest in the matter in dispute, of the injury to which interest he has a right to complain. In this case, his personal complaint being joined to, and incorporated with, the information given to the court by the officer of the crown, they form together an information and bill, and are so termed." Mitf. Ch. Pl. (5th ed.) 22. Unless the bill of the person thus interested is incorporated with the information, he is not a party to the suit. If his bill is incorporated with the information, and it appears that he has no ground for relief, the bill is dismissed; but the information is retained if a case is made for relief for the regulation of the charity. *Attorney General* v. *Vivian*, 1 Russ. 226. *Attorney General* v. *East India Co.* 11 Sim. 380. 1 Dan. Ch. Pract. (5th ed.) 10. The town of Shirley is not a party to the information, but, as the demurrer is well taken on other grounds stated, it is not necessary to express a more decided opinion on this point.

Demurrer sustained.

ROBERT B. CAVERLY *vs.* TIMOTHY MCOWEN.

Middlesex. January 7, 1879. COLT & ENDICOTT, JJ., absent.

The Gen. Sts. *c.* 121, § 84, relating to the removal and punishment of attorneys at law for deceit, malpractice or other gross misconduct, and to their liability in damages to parties injured thereby, do not prevent the defendant, in an action by an attorney at law for services rendered, from showing that they were of no value.

A ruling of the Superior Court on a motion for a new trial, so far as it proceeds on matters of fact or of discretion, or on questions of law which are or might have been raised before verdict, is not the subject of an appeal; and, if the exceptions of a party at the trial in that court are overruled by this court, he cannot, by moving for a new trial or in arrest of judgment in the court below, and appealing to this court from the overruling of such motions, entitle himself to be heard anew, either in that court or in this, upon the correctness of the judgment overruling his exceptions.

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CONTRACT upon an account annexed for services rendered and disbursements made by the plaintiff as an attorney at law. The case was tried in the Superior Court, and a verdict returned for the plaintiff for part of the amount claimed; and he alleged exceptions, which were argued in this court and overruled, and a rescript sent down accordingly. See 123 Mass. 574.

The plaintiff then filed in the Superior Court a motion in arrest of judgment and for a new trial, for the following reasons:

"1st. Because, upon the face of the records and papers, the judgment which must, if ratified, be entered up against the plaintiff, is entirely unconscionable and unjust, and would constitute a litigious unjust precedent.

"2d. Because the defendant's answer in avoidance, (or declaration in set-off, as it might be called,) on which the verdict is founded, and which the plaintiff demurred to, does not set up any matter sufficient in law to authorize the jury to ignore or cancel the plaintiff's entire claim for professional services, or any part thereof.

"3d. Because the defendant's entire avoidance is set up under the common law, and not with reference to the statute, which repeals the common law as to attorneys at law and as to the foundation of the defendant's remedy, if he had any.

"4th. Because by the records and papers it will appear that the defendant had been benefited by the plaintiff's services, and had not in his allegations or proof shown that he had been in the least damaged or injured."

The defendant also at the same time moved that court to set aside the verdict, because it was against law, and against evidence and the weight of evidence, and "because the foundation of the defendant's avoidance, as set up in bar of the plaintiff's account for services then admitted and proved, depended on the Gen. Sts. *c.* 121, § 34, and by some oversight that statute, in its bearing upon the case, had not been discovered until of late, since the trial."

These motions were overruled by *Wilkinson*, J.; and the plaintiff appealed to this court.

R. B. Caverly, (*D. B. Gove* with him,) *pro se.*

G. Stevens, for the defendant, was not called upon.

GRAY, C. J. The Gen. Sts. *c.* 121, § 34, on which the plain-

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tiff mainly relies, relate to the removal and punishment of attorneys at law, for deceit, malpractice or other gross misconduct, and to their liability in damages to parties injured thereby; and have no application to this case, in which the plaintiff seeks to recover for services rendered by him as an attorney at law, and the jury, under rulings since affirmed by this court, have found those services to have been of no value.

The rulings of the Superior Court on the motion for a new trial, so far as they proceeded on matters of fact or of discretion, or on questions of law which were or might have been raised before verdict, are not subjects of appeal. Nor can the plaintiff by moving for a new trial or in arrest of judgment in the court below, and appealing to this court from the overruling of such motions, entitle himself to be heard anew, either in that court or in this, upon the correctness of the judgment by which this court heretofore overruled the exceptions taken at the trial. *Shannon* v. *Shannon*, 10 Allen, 249. *Aldrich* v. *Springfield, Athol & Northeastern Railroad*, 125 Mass. 404.

No other error in law being suggested, the order of the Superior Court, overruling the plaintiff's motions, must be

Affirmed.

NATHANIEL ALLEN'S Case.

Middlesex. January 9.—13, 1879. COLT & ENDICOTT, JJ., absent.

The St. of 1874, c. 306, § 1, providing that no person arrested on a criminal charge, who is released on bail or recognizance, and makes default, shall be permitted to go at large upon further bail or recognizance in the same case, without showing reasonable excuse for such default, is constitutional; and applies to a case in which a person held on a complaint for a certain offence has entered into a recognizance to answer to any indictment that might be found against him for the same offence, and has been defaulted on such recognizance, and afterwards applies to be permitted to recognize anew.

HABEAS CORPUS. At the hearing in this court, before *Ames*, J., it appeared that the petitioner was held in the Police Court of Lowell upon a complaint charging him with the burning of a building on January 20, 1878, and ordered to recognize

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with sureties in the sum of $10,000 for his appearance to answer to any indictment which the grand jury might find against him for said burning, or to any other indictment which they might find against him at June term 1878 of the Superior Court, and, not so recognizing, was duly committed to jail on a mittimus; that said sum of $10,000 was afterwards reduced to $5000, and the petitioner recognized with sureties in the latter sum, according to said order; that when called to answer to an indictment found against him for said burning, at June term, he made default; that a writ of *scire facias* was sued out against him and his sureties, returnable to October term 1878 of the Superior Court, when judgment was entered thereon for the sum of $300; that within one week after the default he was surrendered by himself and his sureties to the custody of the sheriff of Middlesex county, upon a copy of the recognizance; that he has remained in jail at Lowell ever since the surrender; that at October term he was arraigned in the Superior Court upon the indictment against him, and a jury was empanelled to try him thereon; that the jury failed to agree upon a verdict, and was discharged; that thereupon he applied to the justice presiding at that term of the Superior Court to fix a sum in which he might recognize, with sureties, for his appearance to answer further to the indictment; that, upon a hearing, the justice found that he had deliberately made default, without any "reasonable excuse" therefor, and held that, under the St. of 1874, c. 306, he had no power to admit the petitioner to further bail or recognizance, and denied the application. The petitioner contended that the statute was unconstitutional; and that he was entitled to be admitted to bail, notwithstanding the statute.

Upon these facts, the judge reserved the case for the consideration of the full court. If the petitioner was entitled to be further admitted to bail, the petition was to stand for hearing otherwise, the petition was to be dismissed.

C. Cowley, for the petitioner.

C. R. Train, Attorney General, & *J. F. Brown*, Assistant Attorney General, for the Commonwealth, were not called upon.

GRAY, C. J. The court has no doubt that the case in which the indictment was found against the defendant was the same

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case in which he had been bound over to answer to any indictment that might be found against him for the same offence; and that it is within the constitutional authority of the Legislature to enact, as it has done by the St. of 1874, *c.* 306, § 1, that a person accused of crime, who has once been released on bail or recognizance, and has forfeited the same and been surrendered by his sureties, shall not be allowed again to go at large in the same case on bail or recognizance, except by order of a judge of the court in which the charge was pending at the time of the default, and upon showing some reasonable excuse for the default or forfeiture. *Commonwealth* v. *Whitney*, 108 Mass. 5.

Petition dismissed.

ELLEN B. BARTS *vs.* LEONARD MORSE & another.

Middlesex. Jan. 10.—13, 1879. COLT & ENDICOTT, JJ., absent.

In an action for an assault, if the defendant has been allowed to testify fully as to all that was said or done at the time, he has no ground of exception to the exclusion of questions put to him in such a form as to call for an opinion upon the question whether his act was justifiable.

TORT for assault and battery.

At the trial in the Superior Court, before *Aldrich*, J., it appeared that, prior to the alleged assault, the plaintiff, her husband and children were occupying a tenement in a house owned by the defendant Morse, under an oral lease from him to the plaintiff's husband, with rent payable monthly. The plaintiff offered evidence tending to show that on August 6, 1877, the defendants came to that house between nine and ten o'clock in the forenoon, her husband being absent at the time, and commenced taking off the doors; that, as soon as she discovered them, she forbade their doing so, but they continued, and slid the doors off; that, after they had taken the doors off, the defendant Garfield began to remove a chest in the hall from the premises, when the plaintiff raised a chair with which to strike him; that, as she was in the act of striking him, he raised his arm and warded off the blow, pushing the chair towards Morse, who immediately seized it and

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thrust it against the plaintiff's stomach, and also struck her with both of his fists in the same place.

The defendants contended that the tenancy of the plaintiff's husband had been terminated by a written lease of the premises from Morse to Garfield; and also offered evidence of the execution and delivery of such lease, and that they had notified the plaintiff and her husband of the execution of the lease, and requested each of them to vacate said premises; and that Morse acted under and in behalf of Garfield, to aid him in gaining possession of the premises.

There was also evidence tending to show that, after Garfield had affirmed the lease, he gave it to an officer since deceased; and that the officer went to see the plaintiff in regard to moving out, and told her that Garfield had the lease.

Morse, in his evidence, denied that he struck the plaintiff, and that he thrust the chair against her, but admitted that he took hold of it; and he testified that, after a struggle, she gave up her hold on it, and agreed to move out of the premises on the next day; and, after he had described the manner in which the chair was taken from her, his counsel asked him the following questions: "1. Did you use any force other than force necessary to take the chair away from her? 2. Did you use any force upon her except to take the chair away from her? 3. Did you intend to use any force except force necessary to take the chair away from her?" The plaintiff objected to the admission of the above questions; and the judge excluded them. Morse was allowed to testify fully as to all he did and said to the plaintiff at the time, and all that she did and said.

Upon this part of the case, the judge instructed the jury that the defendants had the right to use only so much force as was sufficient in degree and suitable in kind to remove the plaintiff from the premises; that it was for the jury to decide, upon all the evidence, whether the force used was sufficient and suitable; and that, if they should find the force was unsuitable in degree or kind, they should return a verdict for the plaintiff.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions to the exclusion of the above questions.

P. H. Cooney, for the defendants.

W. B. Gale & W. N. Mason, for the plaintiff.

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BY THE COURT. The defendant, having been allowed to testify fully as to all that was said or done at the time, has no just ground of exception to the exclusion of interrogatories put in such a form that they might well appear to the presiding judge to be objectionable as calling for an opinion upon the question whether the defendants' acts were justifiable. *Exceptions overruled.*

AUSTIN T. MERRILL *vs.* HANNAH A. MERRILL.

Middlesex. January 9. — 16, 1879. COLT & ENDICOTT, JJ., absent.

At the trial of a libel for divorce by a husband against his wife alleging impotency on the part of the wife, it appeared that the parties had occupied the same bed for a period of ten years, both being in good health; that the marriage had never been consummated by any act of sexual intercourse; that the husband had often tried to have intercourse with his wife, but she utterly refused to permit it, giving no reason for her refusal; that the husband did not know that the wife was physically incapable of the act of sexual intercourse; and that the wife refused to submit to an examination as to her physical capacity. A female witness testified that the wife had said to her that she "could not have connection with any man," but gave no reason or explanation why she could not. *Held*, that this statement of the wife, taken together with the other evidence, would justify a finding that the charge in the libel was proved; and that a ruling that the evidence would not, in law, justify such a finding was a subject of exception.

LIBEL for divorce from the bond of matrimony, alleging impotency on the part of the libellee.

At the hearing, before *Endicott*, J., it appeared from the testimony of the libellant that the parties were married at Pelham, in the State of New Hampshire, on December 11, 1867, and subsequently lived together as husband and wife at Lowell, in this Commonwealth; that they occupied the same room and bed from the time of the marriage until about a year before the suing out of this libel, a period of nearly ten years; that both parties were in good health; that the marriage had never been consummated by any act of sexual intercourse; that the libellant had often solicited the libellee, and had tried by every means in his power to induce her to consent to his wishes; that she utterly refused to permit sexual intercourse, or to allow the libellant to make the attempt, or even to touch her person for that

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purpose, and on one occasion she kicked him out of bed when he made the attempt; that she gave to him no reason for her refusal, but when he asked her about it she "put him off;" that he did not know that she was physically incapable of the act of sexual intercourse; and that a few weeks after the suing out of this libel, and before the hearing thereon, the libellant, by advice of counsel, took two competent physicians to the room of the libellee for the purpose of having her examined as to her capacity for sexual intercourse, but she utterly refused to be examined. The only other witness in the case was a young woman who had occupied the same room with the libellee for a year since the separation, who testified that she had a conversation with the libellee about two weeks before the trial, in which the latter said, "Mr. Merrill will have to go ahead and get his divorce. I could not have connection with any man." But she gave no reason or explanation why she could not. This was all the evidence in the case.

Upon these facts, the libellant contended that he was entitled to a divorce on the ground alleged in the libel, and asked the judge so to rule. But the judge refused to rule as requested; ruled that the evidence would not, in law, justify a finding that the wife was impotent; and ordered the libel to be dismissed. The libellant alleged exceptions.

W. H. Bent, for the libellant.

No counsel appeared for the libellee.

By the Court. Under the circumstances in evidence, the testimony that the libellee had said that she "could not have connection with any man" would warrant the inference that she meant that she was physically incapable of such connection, and, if so understood, would, taken together with the other evidence in the case, justify a finding that she was impotent, as charged in the libel. The presiding judge having ruled otherwise as matter of law, without passing upon the question of fact, the ruling is a subject of exception. *Nourse* v. *Henshaw*, 123 Mass. 96. *Exceptions sustained.*

At April term 1879, the case was heard by the Chief Justice upon the same evidence, and the libel dismissed

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CATHERINE BELCHER *vs.* MARY A. BURNETT & others.

Middlesex. Jan. 7. — 21, 1879. COLT & ENDICOTT, JJ., absent.

Under a devise to a man and his wife for their lives, and upon their death to such of their children named in the will as shall then be living, the interest of a child will pass by an assignment of his estate in bankruptcy under the U. S. St. of March 2, 1867, § 14, in the lifetime of the parents.

PETITION to the Superior Court for partition of a parcel of land in Cambridge, in which the petitioner claimed one undivided twelfth part. The case was submitted to that court on an agreed statement of facts in substance as follows:

Katharine Morse, the grandmother of the petitioner, under whom the petitioner claims title, died in 1835, seised and possessed of one undivided half part of said parcel of land. Her will, which was duly admitted to probate, contained the following provisions: "I give and devise to my son Royal Morse and Hannah his wife and the survivor of them the use and improvement, during their natural lives and the life of the survivor of them, of all my real estate in said town of Cambridge, to hold to them and the survivor of them for the support and maintenance of my grandchildren hereinafter named. On the decease of the said Royal and Hannah Morse, I give and devise to my grandchildren" (naming them) "all my said real estate, to be equally divided among all my said grandchildren who shall be living at the decease of the survivor of my son Royal Morse and Hannah his wife, to hold to them and their heirs forever."

Royal Morse survived his wife Hannah, and died in 1872, and, at the time of his decease, there were living six of the grandchildren of the testatrix named in the will, of whom the petitioner was one.

On September 2, 1868, the petitioner was, upon her own petition, duly adjudged a bankrupt under the laws of the United States, and all her estate, real and personal, was assigned to James H. Wyeth, who was appointed assignee of her estate. The interest of the bankrupt in said parcel of land was set forth in the schedule of assets filed with the petition in bankruptcy. The assignee in bankruptcy duly sold by public auction, and on November 11, 1868, conveyed in fee simple all his "right,

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title, interest and estate as assignee as aforesaid" in and to the said parcel of land, to George A. Morse, one of the respondents, who claims to hold the share of the bankrupt in said parcel of land under and by virtue of the conveyance to him.

If the petitioner was entitled to partition, judgment was to be entered for her; otherwise, the petition was to be dismissed.

The Superior Court ordered the petition to be dismissed; and the petitioner appealed to this court.

J. Cutler, for the petitioner.

W. S. Hall, for the respondents.

GRAY, C. J. The interest of the petitioner in the estate of her grandmother, though a contingent remainder which would not vest in possession unless and until she survived her parents, was yet vested in her in right from the death of the testatrix, capable of alienation by her during the life of her parents, and, as has been directly adjudged by this court, was such an interest as would pass to an assignee under the insolvent law of the Commonwealth, or under the United States bankrupt act of 1841, subject to the same contingencies in the hands of the assignee as in those of the assignor. *Dunn* v. *Sargent*, 101 Mass. 336. *Merriam* v. *Simonds*, 121 Mass. 198, 202. *Gardner* v. *Hooper*, 3 Gray, 398. *Nash* v. *Nash*, 12 Allen, 345. *Minot* v. *Tappan*, 122 Mass. 535. *Daniels* v. *Eldredge*, 125 Mass. 356.

The terms of the bankrupt act of 1867, though differing in language, are equally comprehensive in effect. U. S. St. March 2, 1867, § 14. U. S. Rev. Sts. §§ 5044, 5046. *Leonard* v. *Nye*, 125 Mass. 455. *Erwin* v. *United States*, 97 U. S. 392. *Durant* v. *Massachusetts Hospital Life Ins. Co.* 2 Lowell, 575, 579. The decision of Mr. Justice Washington in the early case of *Krumbaar* v. *Burt*, 2 Wash. C. C. 406, upon which the petitioner relies, proceeded upon the same narrow construction of the bankrupt act of 1801, which that learned judge afterwards applied in *Vasse* v. *Comegys*, 4 Wash. C. C. 570, in which he was overruled by the Supreme Court of the United States. *Comegys* v. *Vasse*, 1 Pet. 193, 218. *Judgment affirmed.*

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HONORA O'CONNELL *vs.* NATHAN L. BRYANT & another.

Middlesex. January 7. — 28, 1879. COLT & ENDICOTT, JJ., absent

Two persons sued together in tort, who sever in their answers, although they appear by the same attorney, are to be treated as separate parties, and each of them, if he prevails, is entitled to separate costs, except for money paid out for expenses by the two jointly; and, if the plaintiff appeals from the taxation of costs, and the defendants prevail upon the appeal, they are entitled also to the costs thereof.

TORT for breaking and entering the plaintiff's close in Lexington. The defendants, appearing by the same attorney, filed several answers, each containing: 1. A denial of the plaintiff's allegations. 2. A justification of the defendant's acts, as done as, or under the authority of, a surveyor of highways of Lexington within the limits of the public highways in that town, and for the purpose of repairing them. 3. A license from the plaintiff. The verdict was for the defendants. The clerk taxed full costs to each defendant for attorney's fee, travel and term fees. The Superior Court affirmed the taxation; and the plaintiff appealed.

A. Russ, for the plaintiff.

C. Robinson, Jr., for the defendants.

GRAY, C. J. By the well settled practice, two persons sued together in tort, who sever in their answers, although they appear by the same attorney, are to be treated as separate parties, and each of them, if he prevails, is entitled to separate costs, except for money paid out for expenses by the two jointly. Gen. Sts. *c.* 156, § 1. *Mason* v. *Waite*, 1 Pick. 452. *Fales* v. *Stone*, 9 Met. 316. *George* v. *Reed*, 104 Mass. 366. *Upton* v. *Pratt*, 106 Mass. 344. And the defendants, having prevailed upon this appeal, are entitled also to the costs thereof. Gen. Sts. *c.* 156, § 26. *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116, 126. *Taxation affirmed, with costs of appeal.*

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BRIDGET BIGGANE *vs.* ROBERT T. ROSS.

Middlesex. January 8. — 28, 1879. — COLT & ENDICOTT, JJ., absent.

A bastardy process is not transferred to the Superior Court by "appeal or removal," within the meaning of the St. of 1876, c. 60; and may be tried in that court, on certified copies of the papers in the inferior court.

BASTARDY PROCESS. In the Superior Court, after a verdict of guilty, the respondent moved in arrest of judgment, because only copies of the original papers of the proceedings before the Police Court of Cambridge, to which the complaint was originally made, were in court. *Allen*, J., overruled the motion, and passed the order of affiliation; and the respondent appealed to this court.

C. J. McIntire, for the respondent. By the St. of 1862, *c.* 217, § 1, whenever an appeal is taken to the Superior Court in any civil action or proceeding before the Police Court of the City of Boston, or whenever the same is removed to the Superior Court, the original papers are to be transmitted to that court. By the St. of 1876, *c.* 60, the provisions of this section are applied "to all appeals and removals to the Superior Court in any civil action or proceeding before any police, municipal or district court." The complaint in this case was a civil proceeding. Gen. Sts. *c.* 72, §§ 4, 13. *Reardon* v. *Russell*, 9 Gray, 366. *Murphy* v. *Spence*, 9 Gray, 399. The motion in arrest of judgment should therefore have been granted. *Commonwealth* v. *Doty*, 2 Met. 18. *Commonwealth* v. *Burns*, 8 Gray, 482.

E. G. Walker, for the complainant.

AMES, J. In bastardy proceedings, the Superior Court exercises an original and not an appellate jurisdiction. The magistrate who issues the warrant can only proceed so far as is necessary, under the statute, to require the respondent to give bond for his appearance at the higher court. *Thompson* v. *Kenney*, 110 Mass. 317. *Kennedy* v. *Shea*, 110 Mass. 152. The case was therefore not transferred to the Superior Court by appeal or removal; and the St. of 1876, *c.* 60, furnishes no reason why the case may not be tried upon certified copies, instead of the original papers. The judgment of the Superior Court is therefore *Affirmed.*

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HENRY HILL & another *vs.* WILLIAM T. ELDRIDGE.

Norfolk. January 22. — 28, 1879. AMES & SOULE, JJ., absent.

In an action for goods sold and delivered, to which the defence is infancy, the defendant may testify that he was sixteen years of age at the time of the sale.

CONTRACT on an account annexed for goods sold and delivered. Answer: 1. A general denial. 2. Infancy, and that the goods sold were not necessaries.

At the trial in the Superior Court, before *Gardner*, J., without a jury, the only question in issue was that of the defendant's infancy. The defendant was a witness, and, against the plaintiff's objection, was permitted to testify that, when the goods were purchased, he was sixteen years of age, and that, at the time of the trial, he was twenty-three years of age. It appeared that the defendant's father was dead at the time of the trial, but it did not appear whether his mother was living or not. The defendant was the only witness as to his age, and no other evidence was offered in relation thereto. The judge found for the defendant; and the plaintiff alleged exceptions to the admission of the defendant's evidence.

L. H. Babcock, for the plaintiff.

B. D. Washburn, for the defendant, was not called upon.

BY THE COURT. This case does not present the question whether a person can be permitted to testify to the precise day of his birth. It is quite clear that one may testify, from his own knowledge of himself, whether he was twenty-one or sixteen years of age at a certain time, (which was the only material point upon which the testimony of the defendant appears to have been admitted,) and that such weight may be given to his testimony as the court or the jury trying the case may think it entitled to receive. See *Cheever* v. *Congdon*, 34 Mich. 296; *Watson* v. *Brewster*, 1 Penn. St. 381, 383; *State* v. *Cain*, 9 W. Va. 559, 570. *Exceptions overruled.*

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COMMONWEALTH *vs.* MICHAEL H. FAY.
SAME *vs.* JAMES MCGILL.

Bristol. Oct. 22, 1878. — Jan. 1, 1879. ENDICOTT & LORD, JJ., absent.

Since the St. of 1877, c. 211, providing that no justice of the peace shall receive a complaint and issue a warrant in a criminal case, unless he is commissioned as a trial justice, or holds the office of clerk or assistant clerk of a municipal, district or police court, the fact that the justice holds the additional office cannot be proved by extrinsic evidence, but must appear on the face of the papers, and if it does not so appear, it is a defect in the jurisdiction of the court which may be availed of by motion in arrest of judgment, under the St. of 1864, c. 250, §§ 2, 3.

If a complaint is made to J. S., a justice of the peace, and a warrant is issued by J. S. as such justice, returnable to a district court, and certified by "J. S., clerk" of that court, this court is not bound to take judicial notice of the fact that J. S., who received the complaint, was clerk of such district court.

THE FIRST CASE was a complaint on the Gen. Sts. c. 87, §§ 6, 7, made to "Charles H. Sanford, Esq., a justice of the peace within and for the county of Bristol," charging the defendant with keeping and maintaining a certain tenement in New Bedford, used for the illegal sale and illegal keeping of intoxicating liquors, the same being a common nuisance. The jurat on the complaint showed that it was received and sworn to, on January 17, 1878, before "Charles H. Sanford, Justice of the Peace."

At the trial in the Superior Court, before *Dewey*, J., on a copy of the complaint, attested by "Charles H. Sanford, clerk," the jury returned a verdict of guilty; and the defendant moved in arrest of judgment: "1st. Because he says the court has no jurisdiction, in that the complaint does not appear to have been received by and sworn to before any person that had any authority to receive said complaint. 2d. Because it does not appear by the complaint and proceedings therein that Charles H. Sanford, who received and took the oath to said complaint, was a justice of the peace having authority to receive complaints and issue warrants thereon." The judge overruled the motion; and the defendant alleged exceptions.

THE SECOND CASE was a similar complaint made to the same justice of the peace, and sworn to before him on April 11, 1878. The warrant was signed "Charles H. Sanford, Justice of the

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Peace," and directed the officer to arrest the defendant, and bring him before the Third District Court of Bristol.

At the trial in the Superior Court, before *Dewey*, J., on a copy of the complaint, attested as in the first case, the government, against the defendant's objection and exception, was allowed to put in oral evidence to show that the justice of the peace who received the complaint and issued the warrant was the same person who was acting as clerk of the Third District Court of Bristol. The jury returned a verdict of guilty; and the defendant filed a motion in arrest of judgment, on the same grounds as in the first case. The judge overruled the motion; and the defendant alleged exceptions.

H. M. Knowlton, for the defendants.

C. R. Train, Attorney General, for the Commonwealth.

SOULE, J. Since the St. of 1877, *c.* 211, took effect, justices of the peace have had no authority to receive complaints in criminal cases, unless commissioned as trial justices, or holding the office of clerk or assistant clerk of a municipal, district, or police court.*

The complaints in the cases at bar were received by a justice of the peace, to whom they were addressed, and whose certificate does not show that he held any office which authorized him to receive them. On the face of the papers, therefore, nothing appears giving jurisdiction to any magistrate to issue warrants for the arrest of the persons charged in the complaints. The defendants, after verdict, moved in arrest of judgment for this cause. We are of opinion that judgment should have been arrested.

Nothing is presumed in favor of the jurisdiction of inferior magistrates. Their warrants for the arrest of persons are void, unless the authority to issue them appears on the face of the instruments. *Howard* v. *Gosset*, 10 Q. B. 359, 452. 1 Smith

* "Section 1. No justice of the peace, not designated and commissioned as a trial justice, shall hereafter have or exercise any power, authority or jurisdiction to try civil cases, or receive complaints, or issue warrants: provided, however, that any justice of the peace who shall also be a clerk or assistant clerk of any municipal, district or police court, may receive complaints and issue warrants, returnable before some trial justice, police, district or municipal court, having jurisdiction of the examination of the person charged with the offence."

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Lead. Cas. (7th Am. ed.) 1098, note to *Crepps* v. *Durden*, Cowp. 640.

Evidence *aliunde* that the person assuming authority in the premises had such authority by virtue of an official character which the papers did not disclose, was incompetent. Otherwise it would be open to show that warrants, not purporting to be issued by any magistrate, were valid, because the person whose name was signed to them held such office as would have authorized him to issue them as the justice of some court. That this could be done would hardly be contended; but it is in substance what is contended for here. The complaint was not properly received and sworn to because received by a justice of the peace, any more than if received by and sworn to before a private citizen; and evidence that the justice of the peace was also the holder of another office not indicated by the papers, is of precisely the same kind, and open to precisely the same objection, as evidence that the person who certified as a private citizen was a competent magistrate.

We see no force in the argument that, because the record is certified by Charles H. Sanford as clerk of the District Court, the court would be bound to take judicial notice of the fact that the person who received the complaint was the clerk of the District Court, and therefore authorized to receive the complaint. The case of *Commonwealth* v. *Desmond*, 103 Mass. 445, cited by the government on this point, decides that the court is bound judicially to take notice not only of the existence of the Municipal Court of the city of Boston in the county of Suffolk, but also of its local situation and jurisdiction in a city and county within the limits of the Commonwealth. This is very different from the proposition that the certification of the record of the District Court, by Charles H. Sanford as clerk, binds the court judicially to take notice of the fact that he is the Sanford who received the complaint, and to hold, therefore, that the complaint gave jurisdiction to issue a warrant, though on its face received by and sworn to before a person not authorized to receive it nor to administer the oath to the complainant.

The defect in the papers is not formal merely, but goes to the jurisdiction of the court, within the St. of 1864, *c.* 250, §§ 2, 3, there being no authority in any magistrate or inferior court to

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issue warrants for the arrest of persons charged with crime, except upon complaint duly received and sworn to. Gen. Sts. *c.* 170, § 10. The motion in arrest was therefore seasonably made.

Exceptions sustained.

COMMONWEALTH *vs.* JABEZ E. WALCOTT.

Bristol. Oct. 22, 1878. — Jan. 1, 1879. ENDICOTT & LORD, JJ., absent.

Under the St. of 1874, *c.* 293, § 5, a warrant issued by a special justice of the First District Court of Bristol, under his own hand and seal, and returnable to that court, is valid, notwithstanding that, by § 14, the court is given power to establish a seal and to issue all writs and processes.

COLT, J. This is a motion to quash a complaint, because the warrant issued thereon was not under the seal of the District Court to which it was made returnable. The fact, that the seal upon the warrant was not the seal of the court was conceded, if competent and admissible. The complaint was made to a special justice of the court by name, and the warrant was issued by him under his own hand and seal, and was made returnable to the First District Court of Bristol. The words of the attestation clause in the warrant are, "Witness my hand and seal at Mansfield." It does not purport to have been issued by, or to be under the seal of the court. And the answer to the motion, if the objection be now open to the defendant, is that the special justice had authority to affix his own seal to the warrant. No question of disputed fact arises on this motion. *Commonwealth* v. *Donahue*, *ante*, 51.

The St. of 1874, *c.* 293, establishing the First District Court of Bristol, gives to it the jurisdiction exercised by the police courts of the Commonwealth, and subjects it to the provisions of law relating to criminal proceedings in courts of the latter description. It declares that all provisions applicable to such courts and their justices shall be applicable to that court and its justices; and provides for the appointment of one justice, two special justices, and a clerk. The general provisions applicable to police courts are found in the Gen. Sts. *c.* 116. The same

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jurisdiction is there conferred on police courts in all matters relating to criminal offences as justices of the peace have; but that jurisdiction is declared to exclude other police courts and justices of the peace, except as provided in section 17 of the same chapter and section 32 of chapter 120. By these sections, authority was given to justices of the peace to issue warrants without fees, returnable before some police court, or trial justice, for examination. To this extent, the jurisdiction of justices of the peace, over offences committed in their respective counties, was carefully preserved, although the trial must be had in the court for the district where the offence is committed. It is further provided by the Gen. Sts. *c.* 170, §§ 9, 10, that, for the apprehension of persons charged with crime, the justices of the higher courts, or of any police court, in vacation as well as term time, and all justices of the peace, may issue process to bring offenders before the court or magistrate issuing it, or before some other court or magistrate, to be dealt with according to law. These provisions plainly manifest a purpose to provide for the apprehension of offenders upon process issued by the magistrates named, under their own hands and seals, but made returnable to the court having jurisdiction to try the case, because such process may oftentimes be more speedily obtained and the chances of escape diminished. *Commonwealth* v. *Wolcott*, 110 Mass. 67. By the St. of 1877, *c.* 211, justices of the peace have now no authority to receive complaints and issue warrants, unless commissioned as trial justices. *Commonwealth* v. *Fay*, *ante*, 235.

It is provided by the fifth section of the act establishing this District Court, that either of the justices thereof may issue warrants in all proper cases, that no justice of the peace shall be allowed fees for warrants issued within the district, and that all warrants issued shall be made returnable to the court. St. 1874, *c.* 293, § 5. This plainly implies that the justices of the court may issue warrants as justices of the peace formerly might, each under his own seal; and, in view of the course of legislation, the fifth section is not controlled by the provisions of § 14, which gives to the court the power to establish a seal and issue all writs and processes. The latter power is not necessarily inconsistent with the previous authority given to the justices of

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the court to issue warrants in all proper cases. See *Commonwealth* v. *McGuire*, 11 Gray, 459. *Exceptions overruled.*

G. A. Adams, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* OLE LEVY.

Essex. Nov. 8, 1878. — Jan. 1, 1879. ENDICOTT & LORD, JJ., absent.

At the trial of a complaint on the St. of 1875, *c.* 99, for the illegal keeping of intoxicating liquors, with intent unlawfully to sell the same, there was evidence that in the defendant's dwelling-house, where he kept boarders, were a barrel of ale on tap, several bottles containing liquor, an ale-pump, tumblers, a strainer, bowls and dishes; and that in a shed adjoining the house there was an empty ale-barrel. *Held*, that this evidence was sufficient to warrant a verdict of guilty.

COMPLAINT to the First District Court of Essex, on the St. of 1875, *c.* 99, charging the defendant with the illegal keeping of intoxicating liquors with intent unlawfully to sell the same.

At the trial in the Superior Court, before *Putnam*, J., two officers testified that, on the day of the alleged offence, at about two o'clock in the afternoon, they entered the dwelling-house of the defendant; that in the dining-room a table was set with dishes and eatables, and there were chairs around the table; that they could not say whether any of the defendant's family were sitting at the table at dinner; that a boarder of the defendant was sitting in the kitchen adjoining the dining-room; that the wife and children of the defendant and another boarder were in the dining-room; that another person with a glass of beer in his hand was also in the room, but left immediately, and the witnesses did not know whether he was a boarder or not; that the defendant, at the time the officers entered, was coming from a closet, also adjoining the dining-room, with a glass of ale in his hand; that in the closet there was a barrel containing about five gallons of ale on tap, on shelves in the closet, a bottle containing a pint of rum, a bottle containing a pint of whiskey, an ale-pump with a pipe which ran out into the shed, though at the

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time it was unconnected with any barrel of ale, five bottles of lager beer, large and small tumblers, a strainer, bowls, dishes and other articles of crockery and kitchen utensils; and that in a shed adjoining the house an empty ale-barrel was found.

No other evidence was introduced in support of the complaint; and the defendant requested the judge to rule that the evidence was insufficient to warrant a verdict of guilty. But the judge refused so to rule; and submitted the case to the jury under instructions not objected to.

The jury returned a verdict of guilty; and the defendant alleged exceptions to the refusal to rule as requested.

H. P. Moulton, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The possession of intoxicating liquors, even of various kinds and in large quantities, is not of itself, and if that were the only fact proved, sufficient to justify a verdict of guilty, in a complaint like that now under consideration. But the evidence reported in this bill of exceptions goes beyond this limit. It was not only proved that barrels of ale had been upon the premises, and that one was on tap there when the officers entered; but a part of the furniture of the establishment, — the tumblers, the strainer, and especially the apparatus of the beer-pump, — was appropriate to a shop or place of public resort where intoxicating liquors are kept for sale, and furnished an indication of an intent to sell, rather than to apply to the mere domestic use of a single family. All this the jury had a right to consider. It is impossible for us to say that it had no weight or significance, or that there was no evidence to justify their verdict. *Exceptions overruled.*

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SPENCER PETTES *vs.* COMMONWEALTH.

Suffolk. Nov. 25, 1878. — Jan. 21, 1879. MORTON & SOULE, JJ., absent

If an indictment in the first count charges the defendant with the forging of a certain instrument, and in the second count with being an accessory before the fact to the uttering of the instrument by another person, the offence charged in the first count is a different offence from that charged in the second count; and a verdict of acquittal on the first count and of conviction on the second count is not repugnant.

An indictment in the first count charged the defendant with the forging of a certain instrument, and in the second count charged another person with the uttering of the instrument, and then proceeded to charge the defendant with being an accessory before the fact to such uttering. *Held*, that the indictment contained but two counts.

A formal error in an indictment is cured by verdict and judgment thereon, and cannot be availed of on a writ of error.

WRIT OF ERROR to reverse a judgment rendered for the Commonwealth at March term 1874 of the Superior Court for the county of Suffolk, for the transaction of criminal business, upon the following indictment:

"The jurors for the Commonwealth of Massachusetts, on their oath present, that Spencer Pettes, otherwise called F. S. Pettes, otherwise called Henry J. Woodford, of Boston aforesaid, on the eighteenth day of March in the year of our Lord one thousand eight hundred and seventy-one, at Boston aforesaid, did falsely make, alter, forge and counterfeit a certain false, forged and counterfeit voucher, certificate and accountable receipt for money, which said voucher, certificate and receipt was of the tenor following; that is to say, 'Taunton, Mass., March 18th, 1871. No. 9. Mrs. Martha Woodford has deposited in the Machinists' National Bank of Taunton, Mass., ten thousand and one hundred and fifty-two dollars, to the credit of M. Bolles & Co., payable on return of this certificate properly indorsed. $10,152. B. C. Vickery, Cashier.' With intent thereby then and there to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid for the Commonwealth of Massachusetts, on their oath aforesaid, do further present, that one Holden, whose first name is to the jurors unknown, of Boston aforesaid,

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on the eighteenth day of March, in the year of our Lord one thousand eight hundred and seventy-one, at Boston aforesaid, did utter and publish as true a certain false, forged, altered and counterfeit writing, voucher, certificate and accountable receipt for money, which said writing, voucher, certificate and receipt was of the tenor following; that is to say, 'Taunton, Mass., March 18th, 1871. No. 9. Mrs. Martha Woodford has deposited in the Machinists' National Bank of Taunton, Mass., ten thousand one hundred and fifty-two dollars, to the credit of M. Bolles & Co., payable on return of this certificate properly indorsed. $10,152. B. C. Vickery, Cashier.' He, the said Holden, then and there well knowing the said writing, voucher, certificate and receipt to be false, forged, altered and counterfeit as aforesaid, with intent thereby then and there to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, on their oath aforesaid, do further present, that Spencer Pettes, otherwise called F. S. Pettes, otherwise called Henry J. Woodford, late of Boston aforesaid, in the county aforesaid, before the said last-mentioned felony and uttering and publishing was committed in manner and form aforesaid, to wit, on the seventeenth day of March in the year of our Lord one thousand eight hundred and seventy-one, at Boston aforesaid, did unlawfully, maliciously and feloniously counsel, hire, aid, move, encourage, command, incite, and in other ways procure said Holden so uttering and publishing as aforesaid the said last-mentioned felony, and uttering and publishing in manner and form aforesaid to do and commit; and thereby became and was then and there an accessory before the fact to the said last-mentioned felony and uttering and publishing; against the peace of the Commonwealth and the form of the statute in such case made and provided."

The record set forth that the indictment was found and returned into court by the grand jury, at February term 1872, and then continued to March term 1872, when the plaintiff in error was arraigned and pleaded not guilty; that the indictment was then continued from term to term to January term 1873, when the plaintiff in error was again arraigned, and for trial put himself upon the country, and the Commonwealth did the like by its

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attorney; that a jury was duly empanelled and returned a verdict of not guilty on the first count of the indictment, and guilty on the second count; that, after various continuances, the plaintiff in error was sentenced, for the offence set forth in the second count of the indictment, to imprisonment in the state prison for the term of ten years.

The assignment of errors was as follows: "First, that a verdict of guilty was returned on the second count contained in said indictment, and the plaintiff in error was sentenced thereon, and that he was not impleaded nor mentioned in said count, either expressly or by implication. 2d. That the verdict of not guilty on the first count and of guilty on the second count is repugnant, and amounts to an acquittal on both counts." Plea, *in nullo est erratum.*

B. F. Butler & F. F. Heard, for the plaintiff in error.

C. R. Train, Attorney General, *& J. F. Brown*, Assistant Attorney General, for the Commonwealth.

LORD, J. Assuming that the indictment upon which the plaintiff in error was convicted contained but two counts, his counsel contend that the verdict of not guilty on the first count and guilty on the second count was contradictory and repugnant, and that no judgment should have been rendered upon it. The ground upon which this claim is made is, that in a felony an accessory before the fact may be deemed to be, and be convicted as, a principal felon, and inasmuch as the plaintiff in error in this indictment was charged in the first count as a principal felon, and in the second count as being an accessory before the fact to a felony, an acquittal upon the first count was in law an acquittal of the whole charge.

Whatever the law may be upon the state of facts assumed by the counsel of the plaintiff in error, it is sufficient in this case to say that the felony charged in the first count is another and distinct felony from that of which he is charged to have been an accessory before the fact in the second count. The first count charges him with the forging of a certain instrument, and that is the whole of the charge in that count. The second count charges that one Holden uttered and published as true a forged instrument, and that the plaintiff in error was an accessory before the fact to such uttering.

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It has been so long the practice in this Commonwealth to charge the same felony in various counts of an indictment by alleging it to have been committed in various different modes, or by various different means, that the right to do so cannot now be questioned. In this Commonwealth, from the first, it has been the practice to charge a defendant with various and distinct felonies in different counts of the same indictment, and where the felonies are of the same general nature and supported by evidence of a similar kind, and the punishment to be awarded is the same in its nature, the more common practice is to try the whole indictment to the same jury. If there is any danger that such trial will operate to the prejudice of the defendant, the court is authorized to direct the prosecutor to elect upon which count he will proceed. *Commonwealth* v. *Hills*, 10 Cush. 530. *Commonwealth* v. *Sholes*, 13 Allen, 554. *Commonwealth* v. *Costello*, 120 Mass. 358. *Commonwealth* v. *Brown*, 121 Mass. 69.

The next objection to the legality of the conviction is that the indictment contained three counts, and that no offence is charged against the plaintiff in error in the second count; that the second count charges simply that one Holden committed a felony, and the third count charges the defendant as accessory before the fact to the commission of the felony by Holden. This objection is not well founded in fact. The indictment contains but two counts. It is the practice to charge in the same count two defendants, who are both principals in the same felony, although one may be a principal in the first degree, as having actually committed the offence, the other as principal in the second degree by reason of being an accessory before the fact. See precedents in Chitty's Criminal Law and Archbold's Criminal Pleading; *Commonwealth* v. *Cohen*, 120 Mass. 198.

It is not necessary to determine whether there may be verbal or formal errors technically in the second count of the indictment, because any such error is cured by verdict and judgment thereon. See *Carlton* v. *Commonwealth*, 5 Met. 532; *Crowley* v. *Commonwealth*, 11 Met. 578.

If by reason of the nature of the offences, or because of the mode of proof, or because of the joinder of another party in one count, there was a possibility of prejudice to the plaintiff in

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error at his trial, he should, as we have before shown, have asked the court to direct the district attorney to elect upon which count he would proceed.

The rule of the common law that no person can be convicted as an accessory before the fact, until the principal has been convicted, has been abrogated in this Commonwealth. Gen. Sts. *c.* 168, § 4. That section answers all the objections to the form of the indictment. It is in these words: "Whoever counsels, hires, or otherwise procures, a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after his conviction; or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice; and in the last-mentioned case may be punished in the same manner as if convicted of being an accessory before the fact." *Judgment affirmed.*

COMMONWEALTH *vs.* ANDREW BRESSANT.

Suffolk. January 3. — 25, 1879. COLT & ENDICOTT, JJ., absent.

To an indictment for larceny, the defendant filed a plea in bar, averring that he had been arraigned on a complaint before a municipal court, "and said complaint was dismissed; and he was lawfully discharged and acquitted on said complaint of the same offence with which he is now charged in said indictment." *Held*, that a demurrer to the plea was properly sustained.

INDICTMENT charging the defendant, on September 9, 1878, at Boston, with the larceny of "divers promissory notes of the amount and of the value in all of nine hundred and fourteen dollars, a more particular description of which is to the jurors unknown, of the property, goods and chattels of one Nicholas Moens."

At October term 1878 of the Superior Court, the defendant filed a plea in bar, the substance of which appears in the opinion, to which the government demurred. *Putnam*, J., sustained the demurrer and overruled the plea. The defendant was then tried; the jury returned a verdict of guilty; and the defendant alleged exceptions to the ruling sustaining the demurrer.

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G. W. Searle & J. W. Mahan, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The only question which the defendant now presents for our consideration is whether his special plea in bar is a good plea of a former acquittal of the same offence charged in the indictment.

The plea, after alleging that a complaint was made against the defendant before the Municipal Court of the city of Boston, charging him with the larceny of divers promissory notes the property of Nicholas Moens, and that a warrant thereon was issued upon which he was brought before said court and arraigned on the 4th day of October, when he pleaded not guilty, avers that "the case was continued until the tenth day of the present month of October, when he was again brought before said Municipal Court, and said complaint was dismissed, and he was lawfully discharged and acquitted on said com plaint of the same offence with which he is now charged in said indictment."

This is not a good plea of a former acquittal. The leading allegation is, that the "said complaint was dismissed." If the words that follow, "and he was lawfully discharged and acquitted on said complaint," are to be construed as a substantive allegation of a former acquittal, it is inconsistent with and repugnant to the other allegation. The effect of dismissing a complaint without a trial is like that of quashing or entering a *nolle prosequi* of an indictment. By neither of these is the defendant acquitted of the offence charged against him, but he is only exempted from liability on that complaint or indictment. *Commonwealth* v. *Gould*, 12 Gray, 171. Taking the whole allegation together, the only sensible meaning is that the complaint was dismissed, and so the defendant was acquitted, the latter allegation being not an averment of a fact, but a statement of the defendant's conclusion of law from the main facts stated.

A demurrer admits only those facts which are well pleaded. The demurrer of the government in this case admitted that a complaint against the defendant for the same offence charged in the indictment had been dismissed. But, as we have before said, this was not an acquittal of the offence, which could be pleaded or given in evidence in bar of the indictment.

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We are therefore of opinion that the rulings of the Superior Court, sustaining the demurrer and ordering the defendant to plead over to the indictment, were correct.

Exceptions overruled.

COMMONWEALTH *vs.* MARTIN BYRNES.

Middlesex. Nov. 25, 1878. — Jan. 30, 1879. MORTON & SOULE, JJ., absent.

Under the Gen. Sts. *c.* 173, § 8, and the St. of 1864, *c.* 250, § 2, questions of law, arising upon a motion to quash, seasonably filed, and overruled by the Superior Court, may, after the conviction of the defendant, if in the opinion of the presiding judge they are so important or so doubtful as to require the decision of this court, be reported, at the desire or with the consent of the defendant, for its determination.

Under the St. of 1875, *c.* 99, § 1, which enacts that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquors, except as authorized in this act," a complaint, which merely alleges that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this Commonwealth," is insufficient.

COMPLAINT on the St. of 1875, *c.* 99, § 1, to the First District Court of Southern Middlesex, alleging that the defendant, on April 27, 1878, at Framingham in the county of Middlesex, "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this Commonwealth, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided."

Before judgment in the District Court, the defendant moved to quash the complaint, "because there is no sufficient allegation that the defendant was not authorized by law to do the acts therein mentioned," and for other reasons not now necessary to be stated.

This motion was overruled, and the defendant was convicted, and appealed to the Superior Court, and there renewed his motion to quash. *Bacon*, J., overruled the motion; and thereupon the defendant pleaded guilty, and the questions of law, arising at the trial upon the motion so overruled, being in the opinion of the presiding judge so important and doubtful as to require the decision of this court, were reported, at the desire and request of the defendant, for its consideration and determination.

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F. F. Heard, for the defendant.

C. R. Train, Attorney General, & *J. F. Brown*, Assistant Attorney General, for the Commonwealth.

GRAY, C. J. Upon objections to a complaint, specifically assigned by demurrer or motion to quash, filed before judgment in the District Court, and renewed in the Superior Court upon appeal, the decision of the Superior Court is subject to revision by this court on bill of exceptions. St. 1864, *c.* 250, § 2. *Commonwealth* v. *McGovern*, 10 Allen, 193. *Commonwealth* v. *Walton*, 11 Allen, 238. The Gen. Sts. *c.* 173, § 8, authorize any question of law arising "upon the trial of a person convicted in the Superior Court," which in the opinion of the presiding judge is so important or so doubtful as to require the decision of this court, to be reserved, at the desire or with the consent of the defendant, upon report; and apply as well to questions arising upon the trial of an issue of law, as to questions of law arising upon the trial of an issue of fact. *Commonwealth* v. *Boston & Albany Railroad*, 121 Mass. 36. The objections to the sufficiency of the allegations in this complaint are therefore properly before us.

By the St. of 1875, *c.* 99, § 1, upon which this complaint is founded, it is enacted that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquors, except as authorized in this act." It is unnecessary to negative in the complaint the specific exceptions afterwards enumerated in the proviso to this section and in the subsequent sections of the statute. But the exception in the enacting clause of the first section, already quoted, should be negatived, by the words "not having then and there any license, appointment or authority according to law," or by other equivalent words; and the want of any such negative allegation renders this complaint fatally defective. The insertion of the word "unlawfully" does not dispense with the necessity of specifically alleging the elements required by the enacting clause of the statute and by the rules of criminal pleading to constitute the crime charged against the defendant. *Commonwealth* v. *Hart*, 11 Cush. 130, 136. *Commonwealth* v. *Wilson*, 11 Cush. 412. *Commonwealth* v. *Tuttle*, 12 Cush. 502. *Commonwealth* v. *Jennings*, 121 Mass. 47. *Commonwealth* v. *Davis*, 121 Mass. 352.

Complaint quashed.

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COMMONWEALTH *vs.* PATRICK HICKEY.

Middlesex. Nov. 25, 1878. — Jan. 1, 1879. COLT & MORTON, JJ., absent.

An indictment on the St. of 1875, *c.* 99, charging the defendant in one count with "keeping an open bar," and in another count with "keeping a public bar for the sale of spirituous and intoxicating liquors," but not alleging that the defendant unlawfully sold intoxicating liquors or kept or exposed them for sale, does not sufficiently set forth the offence intended to be charged.

INDICTMENT on the St. of 1875, *c.* 99, in three counts. The first count alleged that the defendant, on June 24, 1878, at Cambridge, was the holder of a license of the first class under said statute, which license duly authorized and permitted him to sell spirituous or intoxicating liquors to be drunk on the premises described in the license, but which license was granted to and held by him upon the express provision and condition that he should not keep a public bar on said premises; and that he, "being then and there licensed as aforesaid, did then and there unlawfully, wilfully and knowingly, and without any license or authority therefor, violate the provision and condition of his license, by then and there upon the premises described in the license keeping an open bar." The second and third counts alleged that the defendant, at the time and place above named, "did keep and maintain a public bar," in violation of the condition and provision of his license, for the sale of spirituous and intoxicating liquors.

In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment, assigning the following reasons therefor: "1. That no offence known to the law is set forth therein. 2. That if any offence was committed it is not fully and specifically set forth therein." *Bacon*, J., overruled the motion; the jury returned a verdict of guilty; and the defendant alleged exceptions.

C. J. McIntire, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. It is enacted by the St. of 1875, *c.* 99, § 1, that no person shall sell, or expose or keep for sale spirituous or intoxicating liquors, except as authorized in that act. The licenses which may be granted under the statute are conditional; and in the

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case of a prosecution against a person who has had such a license but has violated its conditions, the general averment that he had no license, authority or appointment according to law to make such sale is sufficient to warrant the introduction of evidence of any sale which was unlawful under the statute. *Commonwealth* v. *Fredericks*, 119 Mass. 199. *Commonwealth* v. *Davis*, 121 Mass. 852. The keeping of a public bar for the sale of intoxicating liquors, although it would be of great weight as proof of the offence, is nowhere defined in any statute as of itself constituting the offence. The criminality lies in the unauthorized sale, or in the exposing or keeping for sale, and does not depend upon, nor is it modified by, the circumstance that the place where the offence is committed is a public bar. The objection to the present indictment is that it makes the keeping of the public bar the offence, instead of the unlawful selling, or keeping or exposing for sale. The first count merely charges the keeping of an "open bar," without charging that it was for the sale or exposure for sale of intoxicating liquors. The remaining counts aver that he kept a "public bar" for the sale of such liquors, but the offence described is still the keeping of the bar, rather than their sale, or the keeping or exposing of them for sale. It is an indirect, argumentative and circuitous way of charging the offence, instead of setting it forth "fully and plainly, substantially and formally," as required by the Constitution.

It is true that by section 13 of the statute, it is provided that any person convicted of a violation "of any of the provisions of his license or of this act" shall be punished; but we do not understand this section to create or define any new offence. It means merely that any person so convicted, having had a license which he has violated, shall, in addition to the general penalty of fine or imprisonment, be punished by a forfeiture of his license, and a disqualification for a limited time to receive a new license. The violation of the conditions of the license can only be by some unlawful or unauthorized act, that is to say, by the sale, or the keeping or exposing for sale, of intoxicating liquors. To keep a public bar for the sale of articles other than intoxicating liquors is not an offence. To keep such liquors for sale is an offence, whether at a public bar or not. If the defendant sold such liquors, in violation of the terms of his license, the

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license goes for nothing, and it is simply a case of unlawful sale under the first section of the act. The indictment now before us, instead of directly and explicitly charging the offence of an unlawful and unauthorized keeping or exposure for sale, selects some of the circumstances attending the transaction as if they were the offence itself, and this we think was not the intent of the statute. It nowhere makes the direct averment that the defendant sold intoxicating liquors, or kept or exposed them for sale. *Exceptions sustained.*

COMMONWEALTH *vs.* JAMES GRIFFITHS & others.

Middlesex. January 1. — 3, 1879. COLT & ENDICOTT, JJ., absent.

An indictment on the Gen. Sts. *c.* 160, § 24, charging the robbery of several "promissory notes then and there of the currency current in said Commonwealth," is sustained by proof that the notes stolen were either bank-bills or treasury notes.

In an indictment, the words "of the currency current in this Commonwealth" are equivalent to "current as money in this Commonwealth."

INDICTMENT on the Gen. Sts. *c.* 160, § 24, alleging that the defendants, on May 19, 1878, at Somerville, made an assault upon John R. Hogan, and "one promissory note, then and there of the currency current in said Commonwealth, of the value of five dollars; one other promissory note, then and there of the currency current in said Commonwealth, of the value of two dollars; one other promissory note then and there of the currency current in said Commonwealth of the value of one dollar, all of the moneys, goods, and chattels and personal property of the said John R. Hogan, from the person and against the will of the said John R. Hogan, then and there feloniously and violently did rob, steal, take and carry away."

At the trial in the Superior Court before *Allen*, J., Hogan testified that the defendants took from him a five-dollar bill, a two-dollar bill, and two one-dollar bills; but he was unable to swear what bank said bills were on, or whether they were United States bills or treasury notes, but they were such bills as were used and passed for money.

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On this evidence, the defendants contended that there was a variance between the allegations in the indictment and the proof as to the property taken; and asked the judge to rule that "if the jury find that the notes alleged to have been taken from Hogan were bank-bills or United States treasury notes, they are not properly described in the indictment as promissory notes, and the defendants cannot be convicted of the robbery or larceny from the person, as alleged in the indictment." But the judge declined so to rule, and ruled that there was no variance.

The jury returned a verdict of guilty; and the defendants alleged exceptions.

I. S. Morse & R. J. McKelleget, for the defendants.

C. R. Train, Attorney General, *& J. F. Brown*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. This case is governed by previous decisions. *Commonwealth* v. *Butts*, 124 Mass. 449. *Commonwealth* v. *Ashton*, 125 Mass. 384. *Commonwealth* v. *Gallagher*, *ante*, 54. The words "of the currency current in this Commonwealth" are equivalent to "current as money in this Commonwealth."

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM H. DEVLIN.

Middlesex. January 8, 1879. ENDICOTT, J., absent.

At the trial of an indictment for the murder of a woman, evidence that the defendant, who was her husband, caused her death by beating, stamping and jumping upon her person, and kicking her upon vital portions of her prostrate body, and that these acts were repeated at intervals during the day, by reason of which she suffered prolonged agony before death, will justify the jury in finding that the defendant was guilty of murder committed with extreme atrocity and cruelty, and consequently of murder in the first degree, under the Gen. Sts. c 160, § 1.

INDICTMENT in two counts for the murder of Hannah Devlin, at Lowell, on December 8, 1877. The first count charged that the murder was caused by the defendant by beating, stamping and jumping upon the said Hannah. The second count alleged that the murder was caused by the defendant "in some way

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and manner, and by some means, acts, instruments and weapons, to the jurors unknown."

At the trial before *Ames* and *Endicott*, JJ., evidence was offered tending to prove the truth of the charge contained in the first count of the indictment; and it was contended by the government that the crime was committed by the defendant with extreme atrocity and cruelty. In the charge to the jury, the court, among other things, instructed the jury as follows: "If upon the evidence you are convinced that the defendant caused the death of the deceased by inflicting severe and violent blows by stamping and jumping on her person, and kicking her while prostrate on the floor upon the head, neck, chest, sides and abdomen, and these acts were repeated at intervals during the afternoon and evening, by reason of which she received fatal injuries of which she finally died, after prolonged agony, it will be competent for you to find the defendant guilty of murder committed with extreme atrocity and cruelty, and consequently of murder in the first degree."

The jury returned a verdict of guilty of murder in the first degree; and, to so much of the charge as is above stated, the defendant alleged exceptions.

W. B. Gale & W. H. Anderson, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

COLT, J. The statutes of this Commonwealth, which define two degrees of murder, declare that, when "committed with extreme atrocity or cruelty," the crime is murder in the first degree. It is for the jury to find the degree, when an issue of fact is joined at the trial, upon a plea of not guilty. Gen Sts. *c.* 160, §§ 1, 3. *Green* v. *Commonwealth*, 12 Allen, 155.

The question of degree was here submitted to the jury, and the only exception taken is to the instruction, that if, upon the evidence, the jury should find certain facts proved, it would be competent for them to find the defendant guilty of murder committed with extreme atrocity and cruelty, and therefore guilty of murder in the first degree.

There was no error in this instruction. There was no attempt on the part of the court to define, as matter of law, what circumstances of enormity or aggravation, what acts of barbarity or torture, would amount to the required degree of criminality.

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The jury were only told that it would be competent for them to find the defendant guilty in the first degree, upon proof of the facts stated; it was wholly left to them to find whether the facts stated were proved, and, if proved, whether they amounted to that extreme atrocity and cruelty which the statute requires, and which calls for the highest degree of punishment.

The crime of murder always implies atrocity and cruelty in the guilty party; but there are degrees of criminality in that respect, even in the felonious and malicious taking of human life; and, in order to justify a finding of murder in the first degree, it requires that something more than the ordinary incidents of the crime shall exist — something implying more than ordinary criminality, and manifesting a degree of atrocity or cruelty which must be considered as peculiar and extreme. The nature of the question is such that it must be largely left to the determination of the jury; and, when there is sufficient evidence to justify it, their finding must be conclusive.

In the case at bar, the jury were required by the instructions to be satisfied that the death was caused by stamping and jumping upon the person of a prostrate woman, and by blows and kicks inflicted with great violence, and repeated during the afternoon and evening, from which, after prolonged agony, she finally died. There can be no doubt that this presents a case of savage, unfeeling, and long continued brutality of purpose, which fully justified the jury in finding the defendant guilty of extreme atrocity and cruelty. Within the reasonable interpretation of the statute, such cruelty must be considered extreme, although it be possible to devise means of producing death which shall manifest a higher degree of criminality. It is enough if the means used were extreme as compared with ordinary means of producing death. *Commonwealth* v. *Desmarteau*, 16 Gray, 1.

Exceptions overruled.

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COMMONWEALTH *vs.* ALBERT W. WORCESTER.

Middlesex. January 1. — 31, 1879. COLT & ENDICOTT, JJ., absent.

A complaint on the Gen. Sts. *c.* 87, § 6, charging the defendant with keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, is sustained by proof that the defendant furnished intoxicating liquors with meals supplied to customers, the payment for which included payment for the liquors.

COMPLAINT on the Gen. Sts. *c.* 87, § 6, charging the defendant with keeping and maintaining a certain dwelling-house in Concord, used for the illegal sale and illegal keeping of intoxicating liquors, the same being a common nuisance.

At the trial in the Superior Court, before *Allen*, J., the government called witnesses who testified that they went to the defendant's dwelling-house on two or three different occasions and had dinners or suppers; that with these meals, and as part thereof, they had wine, lager beer and other liquors; and that when they got through they paid the defendant for the meal, each paying what he pleased, and they thought they paid two dollars each. The evidence did not show that there was any bar there, but that the table was spread, and they had chowder, beef, chickens, &c., and the wine and beer bottles were on the table.

The defendant asked the judge to instruct the jury as follows: "If the jury find upon the evidence that the defendant kept the house described in the complaint as his dwelling-house, and that occasionally parties of young men resorted there for meals of victuals only, that would not constitute such house a nuisance within the meaning of the law, although the defendant furnished with such meals wine or other intoxicating liquors, if the parties simply paid for the meals so furnished, and no bar for the sale of liquor was kept on the premises, and no liquor was sold or furnished except as aforesaid with the meals."

The judge declined to give the instruction requested, but instructed the jury that, if meals were furnished, and, as part of such meals, intoxicating liquors were furnished, and the payment for the meals included payment for the liquors, that

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would constitute an illegal sale within the provisions of the statute.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

I. S. Morse, for the defendant.

J. F. Brown, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

AMES, J. The instructions given by the presiding judge were correct. The purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately. If the meal included intoxicating liquors, the purchase of the meal would be a purchase of the liquors. It would be immaterial that other articles were included in the purchase, and all were charged in one collective price. If a dealer should undertake to present a glass of liquor to everybody who should purchase some small article of him, it would be considered a mere evasion of the law prohibiting the unlicensed sale of intoxicating liquors. As to the instruction which the court was requested to give, if its natural import was not that there was no sale of liquors in this case, if they were furnished as incident to and a part of the meal, and thus paid for, it was at least equivocal, and liable to be so understood by the jury. The judge, therefore, was not bound to give it in the language suggested to him. The instruction which he did give was correct, and contained all that the defendant was entitled to upon that subject.

Exceptions overruled.

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COMMONWEALTH *vs.* JOHN MCCORMACK.

Norfolk. Nov. 25, 1878. — Jan. 1, 1879. COLT & MORTON, JJ., absent.

The omission of the record in a criminal case to show a joinder in a demurrer to an indictment is immaterial, and cannot be objected to after the trial and determination of the issue tendered by the defendant.

If the defendant in a criminal case, after a demurrer to the indictment against him has been overruled, has pleaded over and been found guilty, the case is ripe for final judgment and sentence, and he can then bring the questions of law ruled against him to this court by appeal, without such sentence having been actually awarded.

GRAY, C. J. The defendant, having been indicted in the Superior Court for selling intoxicating liquor without any legal authority or license therefor, demurred to the indictment, specially assigning the grounds of demurrer. The record shows that the demurrer was overruled by the court, the defendant pleaded the general issue, and was tried thereon and found guilty, and then appealed to this court from the judgment against him upon the demurrer.

The only point argued for the defendant is that he is entitled to judgment, because the record does not show that the Commonwealth joined issue on the demurrer. But the omission of the record to show this, like its omission to show a joinder of issue on the plea of not guilty, is wholly immaterial to the rights of the defendant, and cannot be objected to after the trial and determination of the issue of law or fact tendered by him. 1 Chit. Crim. Law, 481, 482. *United States* v. *Gibert*, 2 Sumner, 19, 66. *Commonwealth* v. *McKenna*, 125 Mass. 397.

The attorney general contends that the appeal should be dismissed, because there has been no final disposition of the case in the Superior Court. If the record showed nothing beyond the overruling of the demurrer, that would be so, because it would have been within the discretion of the court below to allow the defendant to answer over, and therefore the case would not appear upon the record to have been wholly and finally disposed of in that court. *Commonwealth* v. *Paulus*, 11 Gray, 305. *Commonwealth* v. *Gloucester*, 110 Mass. 491. But, after the defendant had pleaded over and been found guilty, all questions of law and fact appeared on the record to have been disposed of, so that the case was ripe

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for final judgment and sentence, and the defendant might then bring the questions of law ruled against him to this court by appeal or exceptions, without such sentence having been actually awarded. Gen. Sts. *c.* 114, § 10; *c.* 115, §§ 7–10. *Case* v. *Ladd*, 2 Allen, 130. *Gifford* v. *Rockett*, 119 Mass. 71. *Kellogg* v. *Kimball*, 122 Mass. 168. *Platt* v. *Justices of Superior Court*, 124 Mass. 353. *Commonwealth* v. *Spilman*, 124 Mass. 327. The decision in *Commonwealth* v. *Hanley*, 121 Mass. 377, by which the court, after holding a motion to quash to have been rightly overruled because the complaint was sufficient, rendered judgment in the form of dismissing the appeal, instead of affirming the judgment below, overlooked the fact that, after the overruling of the motion to quash, the defendant had been tried and found guilty by the jury. *Judgment affirmed.*

J. W. Pickering, for the defendant.

C. R. Train, Attorney General, & *J. F. Brown*, Assistant Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* JOHN ROBINSON.

Norfolk. November 27, 1878. — January 18, 1879.

An acquittal on a complaint for keeping and maintaining a tenement for the illegal sale and illegal keeping of intoxicating liquors from January 1 to May 28, is a bar to a complaint for keeping the same tenement for the same purpose from January 1 to August 20 of the same year.

LORD, J. The bill of exceptions in this case presents some questions of certainly unusual, if not entirely novel character.

The complaint made to a District Court charges the defendant with keeping a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors at Braintree, on January 1, 1878, and on divers other days and times between that day and August 20, 1878.

The bill of exceptions states that "in the Superior Court, the case being called for trial, the defendant having duly filed a plea in bar alleging a former acquittal of the same offence, and issue having been joined thereon, the government demurring *ore tenus*.

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it appeared and was admitted that the defendant upon June 19, 1878, was acquitted upon a complaint in said District Court charging him with keeping and maintaining a tenement for the illegal sale and illegal keeping for sale of intoxicating liquors on January 1, 1878, and to May 28, 1878; that the tenement alleged in that complaint was the same as that alleged in the complaint upon trial. The court thereupon sustained the demurrer between June 1, 1878, and August 20, 1878, and the defendant duly excepted thereto."

From this record, it is difficult to understand the precise condition of the case. Literally construed, it would seem as if a demurrer to a plea was sustained in part and overruled in part. We cannot suppose that the Chief Justice presiding intended to make such ruling, but rather that he intended to rule, as matter of law, that the plea was bad as to the time between June 1, 1878, and August 20, 1878, as not covering the whole offence charged in the complaint, and, being thus bad as to a portion of the time covered by the complaint, it was wholly bad; and sustained the demurrer, intending to rule, as matter of law, that the defendant might so far avail himself of the facts stated in the plea as to preclude the government from offering proof of any facts transpiring before June 1, but to allow proof of facts subsequent to that date and prior to August 20, 1878.

Assuming this to be the true view of the facts affecting the rights of the defendant, the question is, was such ruling correct.

We are confirmed in our construction, by the fact that the defendant was directed to plead over, and all evidence of acts prior to June 1 was excluded. The real question thus presented is, whether the former acquittal is a bar to a conviction on the present complaint; and that question is to be decided by deter mining whether the offence charged in that complaint is the same offence with which he is charged in the complaint at bar. If it is the same offence, it is a bar to the present complaint; if it is not the same offence, it is neither a bar to this complaint nor is it admissible in evidence under it. An offence is in its nature indivisible. It may consist of a series of acts, but that series of acts constitutes but one offence. It may not only require a series of acts, but a duration of time, to constitute the offence; but, when the acts and the time are properly proved,

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tLe offence is single and indivisible. There is therefore no such thing known in law as a judgment of conviction or acquittal being a bar to part of an offence. It must be a bar to the whole, or it is of no value.

The offence charged in this complaint is that of keeping a tenement for the illegal sale of intoxicating liquors between the first day of January and the twentieth day of August, 1878. If the defendant thus kept the tenement during every hour of the time between those dates, he has committed but one offence. It is true that such offence is continuous in its character. It is not an offence committed by a single sale of intoxicating liquors, but it is that of maintaining a common resort for the purchase of intoxicating liquors which the Legislature has deemed it proper to declare to be a common nuisance. But it has been frequently held that, in order to constitute the offence, there need be no proof offered that the place was so kept on each day of the time during the interval alleged in the complaint; but it is sufficient if during any portion of such time it was so kept; and it would not be contended by any one that a conviction could be had of the same offence if the time were in the two complaints precisely the same; nor would it be contended that a former conviction would not be a bar if the dates in the new complaint were both within the terminal dates of the former complaint.

It is however contended, that, whenever the last complaint embraces a time which is not included in the previous complaint, evidence may be offered of acts done within such time, and a conviction had. The only case cited by the Commonwealth in support of such proposition is *Commonwealth* v. *Connors*, 116 Mass. 35, and cases there cited. The case, however, fails to sustain the proposition. It is decided upon the distinct ground that there is no one day common to both indictments, and Endicott, J., says: "Evidence that would have been competent on the one indictment would not have been competent on the other." No one of the cases referred to has any tendency to support the claim; and, so far as we are aware, the precise question is a new one in this Commonwealth.

The principles which govern it are, however, quite well settled. The question is fully discussed in *Morey* v. *Commonwealth*, 108 Mass. 433, where the present Chief Justice of this court reviewed

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the whole subject, referring to the leading decisions bearing upon the question, and said: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." In *Commonwealth* v. *Armstrong*, 7 Gray, 49, as well as in several other cases, it is decided that an indictment for being a common seller of intoxicating liquors from a day named to the day of finding the indictment is supported by proof of three sales made on any one day between the days named in the indictment. That case further decides that, although where the offence consists of but a single act, the day on which the act is alleged to have been committed is immaterial, if it appears to have been a day on which the offence charged might have been committed; yet where, on the other hand, the offence charged is continuous in its nature, and requires a series of acts for its commission, the time within which the offence is alleged to have been committed is material, and must be proved as alleged, so when a person is charged with an offence continuous in its nature and requiring for its commission a series of acts, and such offence is alleged to have been committed upon a single day, evidence of any facts tending to establish the offence at any other time than upon the day named is inadmissible.

Applying these principles to the case at bar, the same evidence which would have warranted a conviction upon the first complaint would have warranted a conviction upon the present complaint; for, upon the second complaint, the jury would have been required to convict the defendant if it should appear that he committed the acts complained of at any time between the first day of January and first day of June, 1878.

The plea, therefore, of former acquittal, if established, should have been a bar to this complaint. There are undoubtedly some practical objections to the application of this principle to a case like the present. Those difficulties, however, may readily be obviated by proper care on the part of the pleader. Dewey, J., in *Commonwealth* v. *Traverse*, 11 Allen, 260, remarks that "this form of stating the time, as allowed in this class of cases, gives to the prosecutor great latitude in the allegation of time, but, having fixed it by the indictment, the government is bound by

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it." It therefore becomes important to the prosecutor that, in the exercise of this wide discretion, he should not so allege the time as that the exact facts which would establish the truth of his allegation would also establish the truth of the allegation in an indictment on which the defendant had been previously tried.

Although there are some difficulties in this view, they are by no means so great as they would be if we held differently. There is a seeming inconsistency in saying that a series of acts committed continuously from the first day of January to the twentieth day of August is the identical series of acts committed between the first day of January and the first day of June of the same year; but the inconsistency, when viewed in the light of the technical rules of pleading, is apparent rather than real. The offence is single and indivisible, and, whether the time alleged is longer or shorter, the commission of the acts which constitute it, within any portion of the time alleged, is a bar to the conviction for any other acts committed within the same time. If there had been no previous complaint against this defendant, acts necessary to constitute the offence committed in January would have warranted a conviction which would have been a bar to a conviction of the same offence by other acts in July of the same year.

The test which is to be applied is not what facts were offered in evidence under the former complaint, but whether by the record the facts which might have been proved in the former complaint would necessarily establish the truth of the present complaint, and clearly the truth of the facts necessary to establish the truth of the former complaint would establish the truth of the present.

A more serious practical difficulty arises from the fact that substantially and really it is allowing an amendment to a complaint before an appellate tribunal, which has already been tried before a court of competent jurisdiction. If it should be said that, for the purpose of identifying the former offence, and of showing that the offence now charged is a different offence from the former, by allowing proof only of acts committed after the trial of the former complaint, the reply is, that in law the offences are identical, though the instruments of proof are different. If we reverse the order of the complaints, and in fact a party had

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been convicted upon the last complaint, it would clearly be absurd to say that it might be shown that in this complaint he had been convicted upon evidence of acts committed in July and August, and no evidence was offered of any acts committed during the time alleged in the first complaint. Or, to apply another test, if these two appeals had been pending at the same time, and tried together before the same jury, could the defendant have been convicted upon both? Precisely the same evidence which would require the jury to convict him upon the first complaint, would require them also to convict him upon the second. By the statute, the length of time during which the party is engaged in the business is not an element of the offence, and the identity of the offence can be determined by the discretion of the pleader.

In the case of *Commonwealth* v. *Connors*, 116 Mass. 35, there were two indictments, the first of which alleged the keeping of the tenement on July 1, 1872, and on divers other days and times between that day and May 1, 1873; and the second indictment alleged the keeping on May 1, 1873, and on other days between that day and June 12, 1873. It was objected in that case that two offences were charged, when but one offence had been committed, because, by comparing the indictments, it appeared that the grand jury had, in the two indictments together, charged a continuous keeping of the same tenement upon every day from July 1, 1872, up to June 12, 1873, and that the offence, being continuous, could not be subdivided, and made to constitute two offences, when in fact but one had been committed. This position, however, was decided to be untenable. Because there was no single day common to both indictments, it was held that two distinct offences were charged; thus illustrating the very large discretion vested in the grand jury in limiting the time within which a series of acts may be alleged as constituting a single offence. Other practical difficulties may readily be suggested in the way of holding that precisely the same acts, under allegations which call for no other acts, constitute different offences, and are not the identical offence.

This case differs widely from those cases so fully commented upon in *Morey* v. *Commonwealth*, cited above, in which the same acts done at the same time may constitute both of two distinct

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offences. As a sale of liquor without authority upon the Lord's Day is an offence against the law regulating the sale of intoxicating liquors, so it may be also another and distinct offence of violation of the Lord's Day; and although it has been held that, though the same acts, thus committed at the same time, may constitute two distinct offences, and the party may be convicted of both offences, yet the complaints must be different, must contain different allegations and charge different offences. In the case at bar, the offence charged in the two complaints is the same, and the evidence which would sustain the first complaint would necessarily support the second.

On the whole, therefore, upon the question of law which, without criticising the form, the parties intended to present, namely, whether an acquittal on a complaint charging the defendant with maintaining a nuisance from January 1 to May 28, 1878, is a bar to another complaint for maintaining the same nuisance from January 1, to August 20, 1878, we are of opinion that such an acquittal properly pleaded and duly established is a bar. *Exceptions sustained.*

J. L. Eldridge, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

COMMONWEALTH *vs.* EDWARD FRAHER, 2D.

Norfolk. Nov. 25, 1878.—Jan. 30, 1879. COLT & MORTON, JJ., absent.

A verdict of guilty on an indictment for keeping and maintaining a tenement for the illegal sale and illegal keeping of intoxicating liquors, upon which no judgment has been rendered, and to the rulings at the trial of which exceptions are still pending, is no bar to a complaint for the same offence.

COMPLAINT on the Gen. Sts. *c.* 87, §§ 6, 7, to the District Court of East Norfolk, charging the defendant with keeping and maintaining, on January 1, 1878, and on divers other days between that day and May 9, 1878, a certain tenement in Weymouth, used for the illegal sale and illegal keeping of intoxicating liquors, the same being a common nuisance.

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At the trial in the Superior Court, before *Colburn*, J., the defendant pleaded in bar of the complaint a former conviction, and relied upon the following admitted facts in support of that plea:

At the September term of the Superior Court the defendant was indicted for keeping and maintaining the same tenement as a common nuisance, for the period commencing May 1, 1878, and ending September 6, 1878. He was tried upon that indictment and found guilty. After verdict, he duly filed exceptions to certain rulings at the trial, which were allowed, and were pending at the time of the trial of this complaint. At the former trial, the judge excluded all evidence tending to show the commission of the offence, relating to the period between May 1, 1878, and May 9, 1878.

The judge ruled that these facts did not constitute a bar; and the defendant was tried on evidence relating solely to a time prior to May 1, 1878. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

C. R. Train, Attorney General, & *J. F. Brown*, Assistant Attorney General, for the Commonwealth.

GRAY, C. J. At the time of the trial of this complaint, no judgment had been rendered upon the verdict of guilty on the former indictment, and the question whether that verdict should stand was still open and pending on a bill of exceptions filed by the defendant himself. Under these circumstances, even assuming both prosecutions to be for the same offence, the former verdict will not support the plea of *autrefois convict*. *Commonwealth* v. *Lahy*, 8 Gray, 459, 461. What might be the effect of that verdict, if the defendant had never taken or had afterwards waived his exceptions, and stood ready to abide his sentence thereon, this case does not require us to consider. See *Commonwealth* v. *Roby*, 12 Pick. 496, 510; *Commonwealth* v. *Harris*, 8 Gray, 470, 478; *State* v. *Elden*, 41 Maine, 165; Stark. Crim. Pl. (2d ed.) 330.

Exceptions overruled.

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COMMONWEALTH *vs.* MICHAEL FOYNES.

Essex. Jan. 1. — Feb. 26, 1879. COLT & ENDICOTT, JJ., absent.

If a complaint to a Police Court, purporting to be made by "W. S.," and signed "W. F.," upon which the defendant is tried and convicted in the Superior Court, is amended in that court, after verdict, so as to make it appear that the signature was made by W. S., to which complaint, as amended, the defendant is not called upon to plead, he is entitled to a new trial.

COMPLAINT to the Police Court of Lynn, purporting to be made by "W. Stone," and signed "William Foynes," charging the defendant with unlawfully keeping intoxicating liquor, with intent unlawfully to sell the same in this Commonwealth.

In the Superior Court, on the day after the jury had returned a verdict of guilty, *Putnam*, J., without the knowledge or consent of the defendant or his counsel, and without either of them being in court, permitted the copies of the complaint filed in court, upon which the defendant was tried and convicted, and to which complaint objection and exception had been taken by the defendant before a jury had been sworn or empanelled, to be amended upon motion of the clerk of the Police Court of Lynn, by striking out the name "Foynes" after the name "William" in the signature to the complaint, and inserting the name "Stone," so that the record stood as if the signature and oath to the complaint were made by William Stone instead of William Foynes. The defendant was not called upon to answer or plead to the complaint as amended.

To the ruling of the judge permitting the amendment, the defendant excepted; and also filed a motion in arrest of judgment for the same cause, which motion was overruled. The defendant alleged exceptions.

H. F. Hurlburt, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

SOULE, J. It is well established in this Commonwealth that the copies sent up from a Police Court or a justice of the peace to the appellate court, in case of appeal by a defendant in criminal proceedings, may be amended at any time before the case has been submitted to the jury in the appellate court. *Common*

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wealth v. *Phillips*, 11 Pick. 28. *Commonwealth* v. *Doty*, 2 Met. 18. *Commonwealth* v. *Magoun*, 14 Gray, 398. It is equally well settled that the trial in the appellate court must be on the original allegation of offence, and for the same offence for which the defendant was tried in the court appealed from. A conviction will not be sustained when it appears that the certified copy charges the offence to have been committed on a different day from that charged in the original complaint. *Commonwealth* v. *Phelps*, 11 Gray, 72. A complaint for unlawfully selling intoxicating liquor to a person unknown, on which the defendant was convicted before a lower court on proof of a sale to one person, is not supported at the trial on appeal by proof of a sale to a different person. *Commonwealth* v. *Blood*, 4 Gray, 31. An amendment of the certified copy of the complaint changing the allegation of the time of committing the offence, allowed after a conviction in the appellate court, entitles the defendant to a new trial. *Commonwealth* v. *Dressel*, 110 Mass. 102.

The defendant in the case at bar was convicted on a complaint, as the certified copy showed, which was signed and sworn to by William Foynes. This certified copy was afterward amended so that it appeared that the original complaint was signed and sworn to by William Stone. On that complaint the defendant was not tried in the Superior Court. If he were sentenced upon it, he would be sentenced on a different complaint from that on which he had been tried in the appellate court. The exceptions must therefore be sustained, and there must be a new trial on the complaint as originally signed and sworn to. *Commonwealth* v. *Doty*, 2 Met. 18. *Commonwealth* v. *Dressel*, above cited.

Exceptions sustained.

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COMMONWEALTH *vs.* JOHN DUCEY & others.

Suffolk. January 9. — February 26, 1879.

The St. of 1875, c. 99, § 11, conferring upon the mayor and aldermen of a city, or the selectmen of a town, or any police officer or constable "specially authorized by them," power to "enter upon the premises of any person licensed to sell under this act, to ascertain the manner in which such person conducts his business, and to preserve order," is a reasonable exercise of the police power of the Commonwealth, and is constitutional.

The board of police commissioners of the city of Boston, being vested by the St. of 1878, c. 244, with all the powers given to the mayor and aldermen by the St. of 1875, c. 99, an order of the board of police commissioners of the city of Boston, under the St. of 1878, c. 244, by which the police officers of the city are "specially appointed and authorized" to enter at any time upon the premises of any person licensed to sell intoxicating liquors under the St. of 1875, c. 99, to ascertain the manner in which such person conducts his business, and to preserve order, is legal and valid.

INDICTMENT in two counts. The first count charged that the defendants, on August 25, 1878, at Boston, "with force and arms, in and upon one Henry Dawson, then and there in the peace of said Commonwealth being, an assault did make, he the said Dawson also then and there being a peace officer, called a police officer, and then and there also being in the due and lawful discharge of his duties as such officer." The second count charged a similar assault upon Thomas A. Simpson, also a police officer.

Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

On July 9, 1878, the board of police commissioners of the city of Boston passed the following order: "Ordered, that the police officers of the city of Boston be and they are hereby specially appointed and authorized to enter at any time upon the premises of any person licensed to sell intoxicating liquors, under the provisions of chapter 99 of the acts of the year 1875, to ascertain the manner in which such person conducts his business, and to preserve order; and also do all other acts which officers so appointed are authorized by said statutes to do or perform." This order was communicated to the chief of police of the city, who forthwith sent a copy to each captain of police, with a written order directing it to be communicated to all the officers, which was

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done. Under this order, the captain of the police station to which Dawson and Simpson were attached, directed them to go out on Sunday, August 25, 1878, and visit all liquor shops which they could find open, not designating any particular places; and instructed them to enter all licensed places found open, and to enter them for the purpose of ascertaining how the business was conducted.

On the day above named, Dawson and Simpson, while passing a certain saloon, saw several persons going into an outside door which opened from an entry to the street, through which entry people could pass to apartments above, not occupied by the proprietor of the saloon, and also to a side room, communicating by a door with the bar-room, where liquors were sold. The proprietor had a license to sell intoxicating liquors, which prohibited him from selling on the Lord's day. Both of these rooms were under the control of the proprietor of the saloon, and were covered by the license, and were part of the licensed premises.

The officers testified that, suspecting that liquors were being sold, and for the purpose of ascertaining what was going on, they went into the entry, and followed two men through a door which led from the entry into the side room described above; that they passed from the entry into the side room so quickly that they could not have been prevented from entering by anybody in the side room; that there were seven or eight men in this side room, among whom were the defendants; that when the officers entered the side room they started across it to enter the bar-room by a door that communicated with the side room, and were prevented by the defendants, and pushed by them into the entry.

It was agreed that, if the officers had no legal authority to enter these premises, no more force was used by the defendants than was reasonably necessary to prevent them from entering.

The defendants asked the judge to instruct the jury as follows: "1. The officers entered without authority, and were trespassers. 2. The authority delegated by the police commissioners to all police officers, to enter at their own discretion, at any time, any licensed place, or all licensed places, was a general authority, and not a special authority, and in contravention of the spirit of the law. 3. The authority given by the board of police commission

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ers of the city of Boston, to visit all places licensed to sell liquor, to see how said persons conduct their business, is not such authority as was intended by the Legislature. The particular shop or place, the owner of the shop or place, the time of such visit, and the officers authorized to make such visit, should be specially designated. Such a special order would be contrary to the elementary principles, and in direct violation of the constitutional right of the citizen, as set forth in the Declaration of Rights. 4. The authority given to the board of police commissioners by the St. of 1875, *c.* 99, § 11, and by said commissioners delegated to the police officers of the city of Boston, to enter at any time upon the premises of any person licensed to sell liquor, to see how said business is carried on, does not authorize an officer to break and enter the licensed premises, after a demand by an officer to enter such premises; and a refusal of entrance to the officer by the owner thereof, or his agent or agents, would not justify a forcible entry by the officer."

The judge declined to give the instructions asked for; but submitted the case to the jury under instructions which authorized them to find that, upon the evidence, the officers had the legal right to enter the premises for the purposes for which and in the manner in which they did enter.

The jury returned a verdict of guilty; and the defendants alleged exceptions to the refusal to rule as requested.

J. W. Fox, for the defendants.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. Under the St. of 1878, *c.* 244, the board of police commissioners of the city of Boston is vested with all the powers and duties given to and imposed upon the mayor and aldermen by the St. of 1875, *c.* 99. To determine the construction and effect of the order of the board of police commissioners, in the case before us, it is therefore necessary to consider the provisions of the earlier statute, which, so far as they are material to the present inquiry, are as follows:

Licenses to sell intoxicating liquors may be granted annually by the mayor and aldermen of cities or the selectmen of towns; and every license "shall name the person licensed, shall set forth the nature of the license and the building in which the business is to be carried on," and "shall be expressed to be subject to the

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following conditions: First. That the provisions in regard to the nature of the license, and the building in which the business may be carried on under it, shall be strictly adhered to. Second. That no sale of spirituous or intoxicating liquor shall be made between the hours of twelve at night and six in the morning, nor during any part of the Lord's day, except that, if the licensee is also licensed as an innholder, he may supply such liquor to guests who have resorted to his house for food or lodging. Third. That no liquor, except such as is of good standard quality and free from adulteration, shall be kept or sold on the premises described in the license. Fourth. That no sale or delivery of liquor shall be made on the premises described in the license to a person known to be a drunkard, or to an intoxicated person, or to a minor. Fifth. That there shall be no disorder, indecency, prostitution, lewdness or illegal gaming on the premises described in the license, or on any premises connected therewith by any interior communication." And each license to sell liquors to be drunk on the premises "shall be subject to the further condition that the licensee shall not keep a public bar, and shall hold a license as an innholder or common victualler." St. 1875, *c.* 99, §§ 4, 6, 7.

By § 9, each licensee is required to give bond, the condition of which, according to the form set out in the statute, is that he "shall well and truly comply with all the provisions of the act under which said license is issued, and also shall pay all damages which shall be recovered from him under and pursuant to the provisions of said act." And by § 12, the mayor and aldermen or selectmen, "after notice to the licensee, and reasonable opportunity for him to be heard by them, or by a committee of their number, may declare his license forfeited, upon proof satisfactory to them that he has violated, or permitted to be violated, any of the conditions thereof."

Section 11 is as follows: "The mayor and aldermen of a city, or the selectmen of a town, or any police officer or constable specially authorized by them, may at any time enter upon the premises of any person licensed to sell under this act, to ascertain the manner in which such person conducts his business, and to preserve order. And such police officers or constables may at any time take samples for analysis from any liquors kept on such premises, and the vessel or vessels containing such samples shall

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be sealed on the premises by the seal of the vendor, and shall remain so sealed until presented to the assayer for analysis. The city or town shall pay for the samples so taken; provided such liquors are found to be of good quality, and free from adulteration."

The power conferred by this section upon the officers therein named, to "enter upon the premises of any person licensed to sell under this act, to ascertain the manner in which such person conducts his business, and to preserve order," does not authorize any search or seizure of person or property; and is therefore not open to the objection (which would apply as strongly to the mayor and aldermen or selectmen as to inferior officers) of not providing for a previous oath or affirmation, and a special designation of the persons or objects of search, arrest or seizure, as required by the fourteenth article of the Declaration of Rights. It is but a reasonable exercise of the police power, to preserve the public peace, and to see that the business carried on in the buildings described in the several licenses is conducted according to the conditions of the license, the provisions of the statute under which it is granted, and the stipulations of the bond executed by the licensee himself. As it would be manifestly impracticable, in the cities and the large towns of the Commonwealth, that this duty should be performed by the mayor and aldermen or selectmen in person, they are empowered to commit its performance to so many of the police officers or constables as they may think fit. The words "specially authorized" merely denote the authority to be derived from the order of the mayor and aldermen or selectmen, as distinguished from the powers vested in police officers and constables by virtue of their offices under general laws. To construe these words as requiring every order of the mayor and aldermen or selectmen, authorizing an entry by constables or police officers upon the premises of licensees, to state the names of the officers and to designate particular buildings and times, would be to create unnecessary embarrassment, if not to defeat the whole purpose of the provision.

The order of the board of police commissioners, of which the defendants complain, was therefore legal and valid, and authorized the police officers to enter upon the premises in question; and the defendants, in opposing and obstructing their entry, were

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guilty of an assault. The evidence in this case does not require us to consider the validity of the provision of the statute for the taking of samples of liquors, nor whether the officers would have the right, after demanding and being refused admittance, to break outer doors. No objection to the form of the indictment appears to have been taken in the court below, or is open in this court. *Commonwealth* v. *Kane*, 108 Mass. 423, 425. And the exceptions alleged are not to the instructions given, but only to the refusal to give the instructions requested. *Thayer* v. *Boston*, 124 Mass. 132, 148. As, for the reasons above stated, those instructions were rightly refused, the

Exceptions must be overruled.

GEORGE W. GALE & another *vs.* LUTHER BLAIKIE & another.

Middlesex. Jan. 8, 1878. — Feb. 28, 1879. AMES & LORD, JJ., absent.

If a mechanic's lien has attached for materials furnished, under a contract with the owner of a building, it is not defeated by a conveyance by the owner, while the contract is being performed, of the premises on which the lien is claimed; and the statement of lien is properly filed within thirty days after the last materials are furnished under the contract with the owner.

PETITION to enforce a mechanic's lien for materials furnished in the erection of a house in Cambridge. Trial in the Superior Court, without a jury, before *Rockwell*, J., who ruled, as matter of law, that the petition could not be maintained; and the petitioners alleged exceptions. The facts appear in the opinion.

G. F. Piper, for the petitioners.

J. W. Hammond, for the respondents.

ENDICOTT, J. The petitioners made a contract with the respondent Blaikie to furnish all the lumber required in the erection of a house on land of which Blaikie was the owner; and, in pursuance thereof, actually furnished, between December 21, 1875, and June 20, 1876, the lumber called for by the contract, all of which was used in building the house. A statement in proper form was filed in the clerk's office within thirty days after all the lumber was delivered. In February 1876, Blaikie

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conveyed the premises to the respondent Gooch by a deed duly recorded three days afterwards. Of this deed the petitioner had no actual notice, but continued to furnish the lumber to Blaikie, who remained in possession of the premises.

As Blaikie was the owner of the land when the contract was made, and when the petitioner began to furnish the lumber actually used in constructing the house, the lien attached as of the time the contract was entered into. It comes within the statute, which provides that a person, to whom a debt is due for materials furnished and actually used in the erection of a building, by virtue of a contract with the owner of the land on which the building is to be erected, shall have a lien on the land and building. Gen. Sts. *c.* 150, § 1. The lien, having once attached, continues until all the materials called for by the contract and used in the construction are furnished, and may be enforced, if the person to whom the debt is due has filed a proper statement, as required by § 5. There is no provision of the statutes by which a lien thus created may be dissolved or destroyed by a subsequent conveyance made while the building is in process of erection.

The respondents contend that there is no lien for lumber furnished after the deed to Gooch was recorded, because Gooch was then the owner and did not purchase the materials and did not receive any notice that a lien was to be claimed, as required by § 2; and also that there is no lien for lumber furnished before the recording of the deed, because no statement was filed within thirty days of that time, as required by § 5. But this is not the true construction of the statute. The second section, as amended by the St. of 1872, *c.* 318, § 8, applies only to those cases where at the time of the contract the party making the purchase is not the owner of the land; in such a case the statute provides that "such lien for materials furnished shall not attach" without notice to the owner, by the party furnishing, that he intends to claim a lien. The language relates to the attaching or inception of the lien, and defines the rights of the owner who is not a party to the contract by virtue of which a lien may be created; but it has no application to the rights of one who becomes the owner after the lien has attached and work under the contract has been begun. The case at bar does not fall

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within the rule laid down in *Hayes* v. *Fessenden*, 106 Mass. 228. *Corbett* v. *Greenlaw*, 117 Mass. 167, 175.

Whether Gooch, after the recording of his deed, could have prevented the attachment of a lien for materials not then furnished, under the petitioners' contract with Blaikie, by giving notice to the petitioners that he would not be responsible therefor, as provided in § 4, we are not called upon to decide. He gave no such notice, but allowed Blaikie to remain in possession, and the materials furnished by the petitioner were used in the construction of his building, and enhanced the value of his property.

Our conclusion is, that, upon the facts stated, the lien was not affected by the conveyance, and that the statement was properly filed within thirty days after the last materials were delivered. See *Dunklee* v. *Crane*, 103 Mass. 470.

Exceptions sustained.

SOLOMON H. AMIDON *vs.* QUARTUS W. BENJAMIN.

Franklin. Sept. 17, 1878. — Feb. 28, 1879. ENDICOTT & SOULE, JJ., absent.

At the trial of a petition to enforce a mechanic's lien upon land, the owner of which has, before the filing of the certificate of lien, and with the knowledge of the petitioner, conveyed the land to another, evidence is admissible that such conveyance was fraudulent as to creditors and as to the petitioner as a creditor of the grantor, although the latter is described in the certificate as owner of the premises.

PETITION under the Gen. Sts. *c.* 150, to enforce a mechanic's lien for labor performed and materials furnished in the erection of a building in Montague.

At the trial in the Superior Court, before *Pitman*, J., without a jury, it appeared that, before the filing of the certificate of lien required by the statute, the respondent had conveyed the premises, upon which the lien was claimed, to his daughter, by deed duly executed and recorded; and that the respondent was the only person named as owner in the certificate. The petitioner testified that he knew of such conveyance at the time of filing his certificate, but supposed that the respondent remained

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the actual owner of the estate, because he believed the conveyance to be fraudulent; and offered to prove that the conveyance was fraudulent as to creditors, and as to himself as such creditor. But the judge rejected the evidence; ruled that the petitioner had not complied with the provisions of the statute so as to entitle himself to maintain his lien; ordered judgment for the respondent; and, by consent of parties, reported the case for the determination of this court. If the evidence was rightly rejected, and the ruling was correct, judgment was to be entered for the respondent; otherwise, the judgment was to be set aside, and the case to stand for further hearing.

G. D. Williams, for the petitioner.

A. De Wolf, for the respondent.

GRAY, C. J. Since the argument of this case, it has been decided that the lien of a petitioner under the Gen. Sts. *c.* 150, upon the interest of the person who owns the land when the lien attaches, is not defeated by a subsequent conveyance of the land from him to a third person before the filing of the certificate. *Gale* v. *Blaikie*, *ante*, 274. It would seem, therefore, that this petitioner might safely have treated the conveyance from the respondent to his daughter as made in good faith, and might have described her in his certificate as the owner. But if he chose to assume the burden of asserting and proving that the conveyance was fraudulent and void as against creditors and against himself as a creditor of the grantor, and to describe the grantor in his certificate as the owner, he was at liberty to do so, and, if he succeeded in such proof, it would be made to appear that his certificate truly described the only person as owner, who was, as against him, the owner of the land. The evidence offered was, therefore, wrongly excluded, and there must be a *New trial.*

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BENJAMIN F. ADAMS & another *vs.* WARREN MILLS.

Hampden. Jan. 14.—Feb. 6, 1879. COLT & AMES, JJ., absent.

The deed of a collector of taxes recited that he duly demanded the payment of the tax assessed on the estate sold, and the same was not paid; that, the tax remaining unpaid after the expiration of fourteen days from the demand, he duly advertised the estate to be sold by public auction for the payment of the tax and all costs and expenses; that, the tax not being paid, at the time and place appointed for the sale he adjourned the sale to a certain day, at which time he again adjourned the sale to a certain other day, when he proceeded to sell the estate by public auction "for the discharging and payment of said tax." *Held*, that the deed sufficiently stated the cause of the sale within the requirements of the Gen. Sts. c. 12, § 35.

The right to redeem land from a tax sale is not attachable in an action at law.

BILL IN EQUITY, filed July 9, 1878, under the Gen. Sts. c. 113, § 2, alleging that the plaintiffs, on June 26, 1878, recovered judgment in the Superior Court, against the defendant, in the sum of $629.63, on which execution was duly issued; that the judgment had not been satisfied in whole or in part, and that the defendant had no property that could be come at to be attached at law; that prior to March 12, 1877, the defendant was the owner in remainder of one undivided third part of a parcel of land in Springfield, then subject to a life estate, which land was on the day last named sold by the collector of taxes of Springfield for the taxes of the years 1875 and 1876, and conveyed to said city, by deed dated April 9, 1877, containing the following recital:

"Whereas, the assessors of taxes of said city of Springfield, in the list of assessments for taxes which they committed to me to collect for the years 1875 and 1876, duly assessed Warren Mills as owner of the real estate in said city, which is hereinafter described, the sum of $106.64 for 1875, and $80 for 1876, for state, city and county taxes thereon; and whereas I duly demanded of said Mills the payment of said taxes, so as aforesaid assessed on said real estate, and the same were not paid; and whereas, after the expiration of fourteen days from the time of demanding payment of said taxes as aforesaid, the same still remaining unpaid, I duly advertised said real estate to be sold by public auction for the payment of said taxes and all inci

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dental costs and expenses, on the fifth day of March 1877, at ten o'clock in the forenoon, at the collector's office, city hall, in said city of Springfield, by publishing an advertisement thereof, containing also a substantially accurate description and the name of the owner of said real estate, and the amount of the taxes, so as aforesaid assessed thereon, in the Springfield Daily Union, a public newspaper, printed in the city and county where said real estate lies, three weeks successively, the last publication whereof was one week before the time appointed for the sale, and by posting the said advertisement in a public and convenient place in said city of Springfield, to wit: the county court house; and also on said real estate, three weeks before the time appointed for said sale; and whereas said taxes so as aforesaid assessed on said real estate not being paid, I proceeded, at the time and place appointed as aforesaid for the sale, to adjourn said sale to the tenth day of March 1877, at the hour and place before appointed for said sale, at which time I again adjourned said sale to the twelfth day of March 1877, at the hour and place first appointed for said sale, at which time I proceeded to sell said real estate by public auction, for the discharging and payment of said taxes thereon, and said incidental costs and expenses, and the said real estate was struck off to James L. Mills of Springfield, in the county of Hampden, and state of Massachusetts, for the sum of $221.29, he being the highest bidder therefor. And whereas the said James L. Mills did not, within the period of ten days after the sale made to him as aforesaid, pay to me, the said collector, the said sum offered by him as aforesaid, nor demand or receive a deed therefor, but wholly failed and neglected to do so, whereby and by force of the statute in that behalf provided the said sale to the said James L. Mills became null and void, and therefore the city of Springfield became the purchaser thereof for the sum of $221.29, the same being the amount of the taxes and the incidental costs of said sale."

The prayer of the bill was that the interest of the defendant in the land might be sold, and the proceeds applied towards payment of the plaintiffs' judgment; and that the defendant might be restrained from conveying his interest in the land; and for further relief.

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The answer set up that the deed of the collector was void, because it did not state that the taxes were still unpaid when the sale was made; that the estate in remainder was still in the defendant, and could be attached at law.

Hearing upon bill and answer, before *Soule*, J., who reserved the case for the determination of the full court.

E. B. Maynard & F. H. Gillett, for the plaintiffs.

A. M. Copeland, for the defendant.

SOULE, J. The defence relied on in this case is, that the collector's deed is void in not stating the cause of sale, and that, consequently, a legal estate in the lands described remains in the defendant and is attachable in a suit at law. It is contended that the deed, though it recites a demand by the collector for the tax, and that the tax remained unpaid after fourteen days had elapsed from the time of the demand, and continued unpaid when the land was advertised for sale, and on the day appointed for the sale, when the first adjournment was made, is void, because it does not state that the tax was still unpaid when the sale was made. The right to sell land for taxes exists only in case they have not been paid at the time fixed for the sale; Gen. Sts. *c.* 12, § 33; and the deed given by the collector must state the cause of sale. § 35. So that if the deed in the case at bar fails to show that the tax was unpaid when the sale was made, the plaintiffs cannot maintain their bill.

We are of opinion, however, that the position taken by the defendant calls for an erroneous construction of the collector's deed. The deed first recites a demand and non-payment of the tax, and that it remained unpaid after the lapse of fourteen days from the time of the demand. This shows a legal cause for a sale, and justifies the advertisement and posting of notices, which is then recited. Gen. Sts. *c.* 12, §§ 22, 28, 30. The deed then recites the proceedings of the collector in making the sale, and begins by stating that at the time appointed for the sale, the tax not being paid, he adjourned the sale to the tenth day of March 1877, at a certain hour, and on the last-named day again adjourned the sale to the twelfth day of March at the same hour, when he proceeded to sell the land by public auction for the payment of said tax. If we regard the action of the collector on the day originally appointed for the sale, and the subsequent adjournment

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and sale, as one transaction, constituting together the proceedings of sale, it is plain that the deed recites the non-payment of the tax as the cause of the sale; for it would not be contended that the statute requires the deed to state that the tax was not paid while the sale was in progress, in addition to the statement that it was unpaid when the sale began. And, if we regard the doings of the collector at the several adjournments as distinct from each other, the statement that the tax had not been paid, occurring at the beginning of the narration of the proceedings of sale, may well be understood as referring to and covering the whole period thereafter to and including the time when the sale was actually made, when taken in connection with the subsequent statement that the sale was made for the "discharging and payment of said tax." To hold that a collector's deed containing the recitals which are in that under consideration does not show the cause of sale, would be to require of the officer a nicety and precision in the use of language which it is unreasonable to expect. No one reading this deed could fail to understand that the sale was made because the tax remained unpaid after demand for more than fourteen days before the land was advertised, and was still unpaid when the sale was made.

The case differs materially from *Harrington* v. *Worcester*, 6 Allen, 576, cited by the defendant. The deed in that case did not state that the tax was not paid within fourteen days after demand, and therefore failed to show any legal cause of sale.

The collector's deed being valid, it left in the defendant only a right to redeem the land from the tax sale. This right is not an interest which is attachable in an action at law. Gen. Sts. *c.* 103, § 1. And it being admitted that the plaintiffs are judgment creditors of the defendant, as alleged in their bill, they are entitled to the relief asked for.

Decree for the plaintiffs, with costs.

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LEONARD CLARK *vs.* BOARD OF EXAMINERS OF HAMPDEN COUNTY.

Hampden. January 14; February 14. — 27, 1879.

The duties of a board of examiners of election returns, under the Gen. Sts c. 7, § 25, are purely ministerial, and the board cannot receive or consider evidence of extrinsic circumstances, but is confined to the records of votes returned and laid before it; and mandamus will not lie to compel the board to count certain votes, containing the initial letter only of the Christian name of a candidate, with other votes containing his name in full.

PETITION for a writ of mandamus to compel the respondents to count for the petitioner certain ballots for county commissioner purporting to be for "L. Clark of Springfield," and to notify him of his election. At the hearing before *Colt*, J., the case appeared to be as follows:

On November 5, 1878, an election was had for the office of county commissioner for the term of three years from January 1, 1879; and copies of the records of the votes received in the several cities and towns of the county were returned to the clerk of the courts, and by him presented to the respondents, which copies showed votes cast for county commissioner as follows: 6,287 votes for "Leonard Clark of Springfield," 132 votes for "L. Clark of Springfield," 198 votes for "Leonard Clark," 6,421 votes for "Lawson Sibley of Springfield," 114 votes for "Lawson Sibley," and 39 for other persons. The respondents declined to count the votes for "L. Clark of Springfield" as for the petitioner, and found that Lawson Sibley had received a plurality of votes and was elected, and notified him accordingly; but he declined to accept the office.

The petitioner alleged that the name L. Clark was his name in an abbreviated form, and he was as well known by that name as by his full name of Leonard Clark; and that the votes cast for "L. Clark of Springfield" were intended and should have been counted for him, and it was the duty of the respondents to find him chosen and to notify him of his election. The respondents, in their answer, denied that the petitioner had a plurality of votes, and that L. Clark was his name; and averred that they were ignorant, and had no means or authority for ascertaining.

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whether he was as well known by the name of L. Clark as by that of Leonard Clark, or whether the votes returned as given for L. Clark were intended for him. The petitioner offered to prove by parol evidence that the ballots for "L. Clark of Springfield" were intended for him by those who cast them. The respondents admitted that such was the fact, if competent to be so proved, but objected to the evidence as incompetent and immaterial.

The judge reserved the case for the consideration of the full court; such judgment or order to be entered as law and justice might require.

The case was argued at the bar in January, and afterwards submitted on briefs to the whole court.

M. P. Knowlton, for the petitioner.

G. Wells, for the respondents.

GRAY, C. J. The statutes require that, in all elections, "the names of the persons voted for, the number of votes received for each person, and the title of the office for which he is proposed, shall be entered in words at length" in the town and city records; that copies of the records of the votes for county commissioner in the several cities and towns of each county shall be returned by the city and town clerks to the clerk of the courts, and that on the first Wednesday of the month succeeding the election the board of examiners shall meet, the clerk of the courts shall present the returned copies of votes, "and the board shall open and examine them, and notify the person chosen of his election," and shall within three days after such examination file such copies in the office of the clerk. Gen. Sts. *c.* 7, §§ 15, 17, 25, 26.

The petition now before us does not, like an information in the nature of a *quo warranto*, present the whole question of the right to the office of county commissioner, nor involve the consideration of what evidence might be received upon the trial of that right; but simply presents the question whether the examiners have duly performed the duties, imposed upon them by the statutes, of examining and counting the votes, and notifying the person thereby appearing to be chosen. The nature and limits of these duties have been clearly defined in former judgments of this court. "Nothing can be clearer than that the counting the votes and ascertaining the majorities and giving certificates

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of the result are mere ministerial acts. They have no discretion in determining which of the candidates shall be elected. It must be the result of pure, inflexible mathematical calculation." *Strong, petitioner*, 20 Pick. 484, 497, 498. "They are not made a judicial tribunal, nor authorized to decide upon the validity or the fact of the election, in any other mode than by an examination of 'the returns' made to them, according to law. They are not required or authorized to hear witnesses, or weigh evidence. They have no power to send for persons or papers. If one result appears upon the returns, and another is the real truth of the case, they can only act upon the former. If they have done their duty, the remedy of the person actually elected to the office is not to be sought in a mandamus. This court has no power to direct public officers to do any more than their duty, or anything different from their duty." *Luce* v. *Mayhew*, 13 Gray, 83, 85.

In *Strong's case*, above cited, it was held that, if some of the returns added the residence of the candidate and others omitted it, the latter contained all that the statute demanded, and the former were not vitiated by including more; and therefore that the board of examiners, in refusing to add to votes for Elisha Strong of Northampton votes for Elisha Strong simply, put too strict a construction upon the statute and upon the returns. The court said: "The latter are only evidence of the will of the electors expressed by their ballots. If this evidence is such as to produce reasonable conviction of what that will is, it should be allowed to have its legitimate effect. But if they are so indefinite or ambiguous, in their descriptions of the persons voted for, that it cannot be ascertained that any person has a majority of all the suffrages, then the only proper course would be to send the matter back to the people, to give them an opportunity more clearly to express their will." 20 Pick. 494. Under the statutes then in force, a majority of the whole number of ballots cast was necessary to an election, and, if no person had received such a majority, a new election was required. Rev. Sts. *c.* 4, § 18; *c.* 14, §§ 18–20. But by the statutes now existing a plurality of votes only is necessary, and the person "having the highest number of votes shall be deemed and declared to be elected," so that a new election cannot be ordered unless two or more persons have an equal number of

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votes, and it is the duty of the board of examiners to declare that person to be elected for whom the greatest number of votes can be ascertained from the returns to have been cast, although less than a majority of the whole. Gen. Sts. *c.* 7, § 14; *c.* 10, § 8.

In the present case, the returns of votes show that 6,287 votes were cast for "Leonard Clark of Springfield" and 198 votes for "Leonard Clark," 6,421 votes for "Lawson Sibley of Springfield" and 114 votes for "Lawson Sibley." These votes, reckoned according to the rule established in *Strong's case*, show 6,485 votes for Leonard Clark and 6,535 votes for Lawson Sibley, so that Lawson Sibley appears to be elected by a plurality of 50 votes, unless the board of examiners erred in refusing to count for Leonard Clark 132 other votes cast for "L. Clark of Springfield," and the question to be determined is whether the board of examiners erred in declining so to count these votes.

It is quite usual to express the Christian names of persons, both in their own signatures and by other persons, by one letter only, although a single letter rarely constitutes the whole Christian name. The use of an initial letter only, in legal documents, proceedings or votes, is not to be commended, because of the danger of uncertainty in the identification of the person; yet when no doubt of the identity is created, or any such doubt may be removed by competent evidence, the omission to set forth the Christian name at length, either in a person's own signature or in his description by another person, (even if the latter knows his full name,) though incomplete, is not necessarily erroneous. *Regina* v. *Avery*, 18 Q. B. 576. *Commonwealth* v. *Hamilton*, 15 Gray, 480. *Getchell* v. *Moran*, 124 Mass. 404.

Upon a case of a controverted election, brought before a legislative body vested with the power of determining the elections, returns and qualifications of its own members, or presented to a judicial tribunal by information in the nature of a *quo warranto* or other proper process to try the title to an office, evidence of extrinsic circumstances, such as that no other person of corresponding initials resided in the same city or county, or had been nominated by public convention or otherwise for the office in question, may be introduced, and may satisfy the tribunal having authority to receive and consider it that votes describing the Christian name by a single letter were intended for the same

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person as votes setting forth at length a Christian name having a corresponding initial.

But the board of examiners cannot receive or consider such extrinsic evidence, and is confined to the records of votes returned and laid before it according to the statute. Upon the face of the returns, the votes cast for L. Clark of Springfield may possibly indicate a person whose whole Christian name consists of the letter L., or more probably a person having a name of which this letter is the initial, and which may be either Leonard or Lewis or Luther, or any other name beginning with this letter. This is the utmost that can be known from the returns, taken by themselves. The inference, however plausible, that the votes cast for "L. Clark" were intended to be cast for "Leonard Clark," is left by the returns a matter of conjecture only. It is impossible therefore for this court, upon the record before it, to say that the board of examiners erred in refusing to count the votes in question for Leonard Clark.

This view of the case is supported by the opinions of most respectable judges in Maine and in New York. *Opinion of Justices*, 64 Maine, 596. *People* v. *Ferguson*, 8 Cowen, 102, 106, 107. *People* v. *Seaman*, 5 Denio, 409. *People* v. *Cook*, 14 Barb. 259, and 4 Selden, 67. *People* v. *Pease*, 27 N. Y. 45. *People* v. *Smith*, 45 N. Y. 772, 779. In Michigan, the judges, differing from those of New York in the cases just cited, have gone so far as to hold that, even upon an information to try the title to an office, votes describing the Christian name by a single letter could not be added to votes for a person of a corresponding full name. *People* v. *Tisdale*, 1 Doug. (Mich.) 59. *People* v. *Higgins*, 3 Mich. 233. *People* v. *Cicott*, 16 Mich. 283. *People* v. *Molitor*, 23 Mich. 342. In *People* v. *Cicott*, doubts were expressed whether such an application of the rule was not erroneous in principle; but neither in that case, nor in any other with which the learning and research of counsel have supplied us, has it been held to be competent for a mere board of examiners or canvassers to determine that such votes should be counted for the same person.

As Leonard Clark did not appear on the face of the returns to have received a plurality of votes, the contingency did not arise in which it would become the duty of the board of examiners,

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under the Gen. Sts. *c.* 7, § 25, to ascertain the person of the name of Clark designated in any of the votes, in order to notify him of his election.

For these reasons, it is the opinion of a majority of the court that the writ of mandamus prayed for must be *Refused.*

JOHN R. WILLIAMS & another *vs.* CITY OF TAUNTON.
EDWIN WILLIAMS *vs.* SAME.
ALEXANDER H. WILLIAMS *vs.* SAME.

Bristol. Oct. 25, 1878. — Feb. 26, 1879. ENDICOTT & LORD, JJ., absent.

A person who applies to the Superior Court, under the St. of 1873, *c.* 261, for a jury to assess the damages occasioned by the taking of his land by a city, under the St. of 1875, *c.* 217, is under no obligation to enter into a recognizance for costs, and, if the jury award him a sum smaller than that previously awarded by the county commissioners, the city is not entitled to judgment for costs; and, on an appeal by the city from an order disallowing its motion for costs, if the order is affirmed, the costs of the appeal are to be taxed against the city.

SOULE, J. The petitioners in these cases, having been injured in their property by the action of the respondent in taking land, under the St. of 1875, *c.* 217, applied to the county commissioners to assess their damages; and, being dissatisfied with the amount awarded, filed their petitions in the Superior Court, under the St. of 1873, *c.* 261, for assessment of their damages by a jury. In each case a verdict was returned for the petitioners for a smaller sum than the county commissioners awarded. The respondent moved for judgment for costs. The court overruled the motion, and the respondent appealed.

It is provided by the St. of 1875, *c.* 217, § 2, that any person injured in his property under that statute, and failing to agree with the city of Taunton as to the amount of damages, may have the same assessed and determined in the same manner as is provided where land is taken for highways.

It was early held that the statute provision giving costs to the party prevailing in civil actions does not apply to proceedings of this kind. *Commonwealth* v. *Carpenter*, 3 Mass. 268.

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Hampshire & Hampden Canal Co. v. *Ashley*, 15 Pick. 496. It is true that it is provided by the Gen. Sts. *c.* 43, § 24, that in case of land taken for a highway no jury shall be ordered till the petitioners give recognizance to the county for the payment of all costs and expenses which arise, in case the jury shall not increase the damages allowed by the commissioners; while § 44 provides that, if the jury do not increase the amount of damages, the costs incurred by reason of the application of the jury shall be paid by the persons who recognize for the payment of costs. But this recognizance and payment under it are not to be confounded with the payment of costs to a prevailing party. Under the provisions of the law, as it stood before the St. of 1873, *c.* 261, the county commissioners were the only officers who could set in motion the machinery for summoning a jury to assess damages for land taken for a highway; the jurors summoned, the officers attending them, and the person who presided at the trial, received their fees from the treasury of the county, the county standing in the position of advancing the money necessary to the proceedings without reference to its interest in the result, but merely because by the provisions of statute the same officers who laid out the highway, and who made the original award, were invested with the authority to call into existence the other tribunal, the jury, which might, according to its judgment, enlarge or diminish the amount of damages to be paid to the landowner. In proceedings like those in the case at bar, this relation of the county to the matter is especially manifest. It is in no way interested in the result, and a recognizance taken by it from petitioners is merely for its own protection against loss by reason of advancing the money for calling and keeping the jury, and for paying the officer who presides at the trial. If the petitioners in such case, as in case of proceedings to recover for land taken by a railroad corporation, pay the moneys thus advanced, they would be entitled to include the amount in their bill of costs, if the circumstances of the case were such that they could recover costs against the opposing party.

Beside the sections above referred to, there is no provision in the statute which has ever been regarded as suggesting that the party taking lands for a highway could under any circumstances

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recover costs against the landowner. The statute is silent on the subject, and apparently for reasons which are recognized as good and sufficient. As was said in the case of *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116, 121, "It is not to be presumed, without clear words, that the Legislature would afford to the citizen, whose property had been taken against his will, his constitutional right of having his damages assessed by a jury, only upon the condition of paying costs if the jury should assess them at a less sum than that estimated by public officers in whose appointment he had no greater share than any other citizen of the county, and whose estimate could not lawfully be made conclusive upon him."

Even if, as the respondent contends, the petitioner to the Superior Court for a jury is under obligation to give a recognizance for costs, such recognizance being for the benefit of the county only, the omission to give it has no bearing on the question of costs between the parties. We think, moreover, that the statute provision for the recognizance applies only when a sheriff's jury is asked for, and has no reference to the application for a jury in the Superior Court. The St. of 1873, *c.* 261, provides that application for a jury may be made by petition to the Superior Court, in all cases when a sheriff's jury may be had for any purpose, and thereupon, after such notice as the court may order to the adverse party, a trial may be had at the bar of said court in the same manner other civil cases are there tried by jury. The statute says nothing about a recognizance, and it would be an anomaly in that court if a party were required to recognize to the county for costs before he could submit his rights to the decision of a jury.

The motion of the respondent for judgment in its favor for costs was properly denied. The judgment appealed from being sustained, justice requires that the costs incurred by the appeal should be taxed against the respondent. Gen. Sts. *c.* 156, § 26. *New Haven & Northampton Co.* v. *Northampton*, *ubi supra*.

Judgment affirmed, with costs

T. M. Stetson & S. M. Thomas, for the respondent.

C. A. Reed, for the petitioners.

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AMOS F. BREED *vs.* CITY OF LYNN.

Essex Nov. 7, 1878. — Feb. 26, 1879. ENDICOTT & LORD, JJ., absent.

On a petition to the Superior Court, under the St. of 1871, *c.* 382, for a jury to revise an assessment of betterments, which has, since the petition was brought, been adjudged void by this court on *certiorari*, the petitioner is not entitled to go to a jury; and the petition may properly be dismissed without costs to either party.

PETITION to the Superior Court, under the St. of 1871, *c.* 382, for a jury to revise an assessment of betterments upon the estate of the petitioner.

In the Superior Court, when the case was reached for trial, it was stated to the court, and agreed by both parties, that, since this petition was brought, the Supreme Judicial Court, upon a petition for a writ of certiorari, had adjudged that the assessment which this petition was brought to revise was void *ab initio*.

The petitioner contended that he had the right to go to a jury; and that he was entitled to a verdict reducing the assessment to nothing, so as to entitle him to costs. The respondent objected to this, and contended that, if the case was submitted to a jury, a verdict should be rendered for the respondent.

Upon these facts, *Colburn*, J., ruled that there was nothing to be submitted to a jury; and ordered the petition to be dismissed without costs to either party. To this ruling both parties alleged exceptions.

A. Jones, for the petitioner.

R. E. Harmon, for the respondent.

SOULE, J. This petition to the Superior Court for the revision by a jury of an assessment of betterments, under the St. of 1871, *c.* 382, is not a civil action, within the meaning of that term as used in the Gen. Sts. *c.* 156, § 1; and the right of the prevailing party to costs, in proceedings under such petition, is not determined by that section. It is not a new and original action, nor a process to reverse a judgment already rendered, but is only a step in the cause begun before the proper board of officers of the city of Lynn, which suspends all proceedings to enforce the assessment by that board, until final action on the

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petition is had. In this respect it is analogous to the application of a landowner for a jury to assess his damages for land taken for a highway, or for a railroad. *New Haven & Northampton Co.* v. *Northampton*, 102 Mass. 116. *Commonwealth* v. *Boston & Maine Railroad*, 3 Cush. 25, 55. *Williams* v. *Taunton*, *ante*, 287.

The only provision of statute, relating in terms to the recovery of costs by either party, in petitions like that under consideration, is contained in § 8 of the statute under which the petition is made, and gives costs to the petitioner if the jury reduces the amount of the assessment, and costs to the respondent if the jury does not reduce the amount of the assessment. This provision clearly applies only to those cases in which the jury passes on the question, whether the assessment complained of is excessive or not, and imports that the amount assessed by the jury is to be compared with that assessed by the board of city officers. *Drury* v. *Boston*, 101 Mass. 439. It cannot be invoked to determine the right of either party to costs, where the petition is disposed of without any action by the jury.

If the case had gone to the jury, it would not have been open to the petitioner to question the validity of the proceedings of the city officers in making the assessment. The only question to be tried would have been the question whether the assessment was excessive or not, and the burden would have been on the petitioner to prove that it was so. The question of the validity of the proceedings in making the assessment could be tried only on a petition for *certiorari*. *Bigelow* v. *Boston*, 120 Mass. 326. *Hitchcock* v. *Aldermen of Springfield*, 121 Mass. 382. The petition assumed the validity of the proceedings by the city officers. It was competent, therefore, for the respondent to show to the court that, on due proceedings had before the proper tribunal since the petition was made, the proceedings in which the assessment was made had been quashed, and become null and void. This being done, the case stood in a situation for which no provision as to costs exists in the St. of 1871, and the ruling was correct that neither party was entitled to costs thereunder.

Neither party can sustain its exceptions, on the ground that the provisions of the Gen. Sts. *c.* 156, § 16, reach the case, because, even if that section is applicable, it makes the allow

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ance of costs, in cases where no express provision therefor is made, a matter of discretion, and to the decision of the court in matters of discretion no exception lies.

Exceptions of both parties overruled.

JAMES C. WOODSIDE *vs.* HARRIET A. RIDGEWAY & others.

Suffolk. March 9, 1878. — February 5, 1879.

A lessee, who has never been in possession of the premises, and who acquires title through a purchaser at a mortgagee's sale, neither the purchaser nor the mortgagee having ever been in possession, cannot maintain an action, on the Gen. Sts. *c.* 137, for forcible entry and detainer.

ACTION on the Gen. Sts. *c.* 137, to recover possession of certain rooms in a house in Boston. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on agreed facts, the substance of which appears in the opinion.

W. W. Blackmar & H. N. Sheldon, for the plaintiff.

A. Russ, for the defendants.

MORTON, J. It appears by the statement of facts that the defendants and one Comley were the owners of an undivided half of a house in Boston, Mrs. Weaver being the owner of the other undivided half; that, by an oral arrangement between the parties, the defendants took possession of, and have since exclusively occupied, the rooms in controversy; that afterwards, in July, 1874, the defendants and Comley mortgaged their undivided half to one Blackmar; that the mortgagee entered for breach of the condition, and sold the mortgaged premises to one Squire, under a power of sale contained in the mortgage; that Squire afterwards assigned his right and interest to Mrs. Weaver, who thus acquired possession of all the house except the rooms in question; that she, in October 1876, executed a lease to the plaintiff of the whole house; and that he endeavored to evict the defendants from the rooms occupied by them, and was forcibly resisted.

The plaintiff seeks by this suit to obtain possession of the

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house to the exclusion of the defendants, and not to assert any right to a joint possession which Mrs. Weaver might have had as a tenant in common, under the decision in *Presbrey* v. *Presbrey*, 13 Allen, 281.

His right depends upon the sale under the mortgage made by the defendants. He can have no greater rights than those of the purchaser at that sale. But neither the mortgagee nor the purchaser at the mortgage sale has ever had possession of the disputed premises. The case therefore falls within the principle of *Boyle* v. *Boyle*, 121 Mass. 85, which decides that a mortgagee or a purchaser not in possession cannot maintain this process for the purpose of obtaining possession, the object of the statute being to give a speedy remedy to those who, being in possession of land, are unlawfully dispossessed by force, and not to permit questions of title to be tried by a summary process before an inferior tribunal.

The plaintiff relies upon *Kinsley* v. *Ames*, 2 Met. 29, but we think the cases are distinguishable. In that case, as explained in *Howard* v. *Merriam*, 5 Cush. 563, the defendant gave a mortgage of his farm, with a power of sale, and the estate was sold by an assignee of the mortgage, pursuant to the power, and with the assent of the mortgagor. The purchaser entered on a part of the premises, and gave notice to the defendant to surrender the possession of the house; but the latter refused, and resisted with menaces and force. It was held that the defendant was not a tenant at will, and was not entitled to notice to quit, and that, the plaintiff having rightfully entered on a part of the premises, the forcible resistance to his entry on the remainder constituted a forcible detainer within the statute. The court assumed, as one of the elements of the case, that the plaintiff was in the actual occupation of a part of the mortgaged premises. The character of his occupation, and the mode in which he obtained possession of the rest of the farm, whether by consent of the defendant or otherwise, are not stated or discussed. It is also to be observed, that in that case it does not appear that the defendant ever raised any question of title in himself.

It is true that in the opening paragraph of the opinion Chief Justice Shaw states that he presumed that the cause was transferred from the justice to the Court of Common Pleas without a

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trial, because it appeared that the title to the freehold was brought in question; but the fact is otherwise. It appears from the original papers on file, that the case was tried before the justice, and appealed to the Court of Common Pleas, where a trial was had, which resulted in a verdict for the defendant, and the case was then appealed to this court. In the record of the case, there is nothing to show that the defendant ever denied the plaintiff's title or his right to possession; the only ground of his defence apparently being that he was entitled to three months' notice to quit as a tenant at will of the house.

The question whether the plaintiff had such possession as to entitle him to the process of forcible entry and detainer, instead of a writ of entry, was not argued in this court, the fact being, as appears from the minutes of the late Judge Metcalf, then reporter of decisions, that the case was not argued by the defendant's counsel. We cannot therefore regard that case as an authority in the case at bar, in which the defendants have never, by giving possession or otherwise, recognized the title of the plaintiff, or his possession or right to possession of the disputed premises, but claim the right to rely upon an adverse title.

The plaintiff cannot, in this form of action, try the question of the validity of his title. *Judgment for the defendants.*

STEPHEN HAMMOND *vs.* GUSTOF DANIELSON & another.

Suffolk. Nov. 16, 1877. — Feb. 25, 1879. COLT & AMES, JJ., absent.

A hack, described as in use at certain stables, was mortgaged, and, by the terms of the mortgage, the mortgagor was to retain possession, and use and enjoy the same until default. While so in possession, the mortgagor had it repaired. *Held*, that the person making the repairs had a lien therefor as against the mortgagee.

REPLEVIN of a hack. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on agreed facts, in substance as follows:

On January 23, Edward Brackett, the owner of the hack in question, executed and delivered the following mortgage to the plaintiff:

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"Know all men by these presents, that I, Edward Brackett, of Boston, in the county of Suffolk, in consideration of five hundred dollars paid by Stephen Hammond of Boston, aforesaid, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said Stephen the following goods and chattels, namely, one hack, built by Hall, now in use at the American Stables, Sudbury Street, Boston, and numbered 277. To have and to hold all and singular the said goods and chattels to the said Stephen Hammond and his executors, administrators and assigns, to their own use and behoof forever. And I hereby covenant with the grantee that I am the lawful owner of the said goods and chattels; that they are free from all incumbrances; that I have good right to sell the same as aforesaid; and that I will warrant and defend the same against the lawful claims and demands of all persons. Provided, nevertheless, that if the grantor or his executors, administrators or assigns shall pay unto the grantee or his executors, administrators or assigns the sum of five hundred dollars in two years from this date, with interest semiannually at the rate of six per cent. per annum, and until such payment shall not waste or destroy the same, nor suffer them or any part thereof to be attached on mesne process, and shall not, except with the consent in writing of the grantee or his representatives, attempt to sell the same or any part thereof, then this deed, as also a note of even date herewith, signed by Edward Brackett, whereby he promises to pay to the grantee or order the said sum and interest at the times aforesaid, shall both be void. And it is agreed that, until default in the performance of the condition of this deed, the grantor and his executors, administrators and assigns may retain possession of the above-mortgaged property and may use and enjoy the same. In witness whereof I hereunto set my hand and seal, and affix and cancel the stamp required by law, this twenty-third day of January in the year one thousand eight hundred and seventy-three."

This mortgage was duly recorded on January 30, 1873. Agreeably to the terms of the mortgage, Brackett retained possession of and used the hack, and in May or June 1875 took the same to the defendants, who made certain repairs thereon; for which repairs, Brackett having failed to pay the same, the defendants claim to have a lien on the hack. The defendants had no knowl-

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edge of the mortgage except what may be legally presumed from the mortgage being recorded. The plaintiff, the mortgage having become due and not being paid, made a demand on the defendants for the hack, showing them his mortgage, and claiming the hack as mortgagee. The defendants refused to pay the mortgage or give up the hack, unless their claim for repairs was paid.

S. A. Bolster, for the plaintiff.

D. F. Fitz, for the defendants.

GRAY, C. J. A lien on personal property cannot indeed be created without authority of the owner. *Hollingsworth* v. *Dow*, 19 Pick. 228. *Globe Works* v. *Wright*, 106 Mass. 207. But in the present case such an authority must be implied from the facts agreed. The subject of the mortgage is a hack, that is to say, a carriage let for hire; described in the mortgage as "now in use" at certain stables; and which, as the parties have agreed in the case stated, the mortgagor retained possession of and used agreeably to the terms of the mortgage. It was the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt. The case is analogous to those in which courts of common law, as well as of admiralty, have held, upon general principles, independently of any provision of statute, that liens for repairs made by mechanics upon vessels in their possession take precedence of prior mortgages. *Williams* v. *Allsup*, 10 C. B. (N. S.) 417. *The Scio*, L. R. 1 Adm. & Eccl. 353, 355. *The Granite State*, 1 Sprague, 277. *Donnell* v. *The Starlight*, 103 Mass. 227, 233. *The St. Joseph*, 1 Brown Adm. 202.

Judgment affirmed.

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MARGARET E. DEGNAN *vs.* EPHRAIM W. FARR.

Suffolk. November 15, 1877. — February 26, 1879.

To secure a loan made by a wife to her husband of money which came to her before marriage, the husband, in 1875, executed a mortgage of personal property to A., to secure the payment of a promissory note of even date, signed by the husband, and payable to A. or order. On the same day, A. executed a deed on the back of the mortgage, assigning to the wife the mortgage deed, the note and claim thereby secured, and all his right, title and interest in the property mortgaged; but did not indorse the note. *Held*, that the wife, after a demand under the Gen. Sts. c. 123, § 63, could maintain an action against an officer, who attached the mortgaged property on a writ against the husband. *Held*, *also*, that she might properly, in her demand upon the officer, describe the sum due upon the note as due to her upon the mortgage.

TORT in the nature of trover. Trial in the Superior Court before *Gardner*, J., who, after verdict for the plaintiff, reported the following case for the determination of this court:

On December 2, 1875, Patrick F. Degnan executed a mortgage of personal property to Thomas Higgins, to secure the payment of a promissory note of that date for $2000, signed by Degnan, and payable to Higgins or order in one year, with interest at the rate of seven per cent per annum. On the same day, Higgins executed on the back of the mortgage a deed, assigning to the wife of the mortgagor "the within mortgage deed, the note and claim thereby secured, and all my right, title and interest in the personal property thereby conveyed." The mortgage and assignment were duly recorded in the city clerk's office. The note and mortgage were made and assigned in this manner, to secure to the wife repayment of a loan by her to her husband of money which came to her before marriage.

On January 3, 1876, the property was attached by a constable of Boston upon a writ sued out against the husband by one of his creditors, which was duly returned into court. On the next day the wife made a demand in writing upon the officer of "the sum of two thousand dollars, with interest thereon at seven per cent per annum from December 2, 1875, which is the amount now due me on a mortgage given by Patrick F. Degnan to Thomas Higgins, and assigned to me by said Higgins," and further describing the mortgage and assignment by their dates and records and as covering the property now held by the offi-

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cer "on attachment at number 137 Tyler Street, in said city, as the property of the said Patrick F. Degnan." This demand not having been complied with, the wife brought this action against the attaching officer.

The defendant contended that the note of the husband, when assigned to the wife, was extinguished, that the demand of payment was therefore invalid, and that the action could not be maintained.

The judge ruled that the plaintiff had such title by the mortgage as to enable her to maintain this action, and directed a general verdict for the plaintiff. If, in the opinion of this court, the plaintiff, having no title or claim to the property except as assignee of the mortgage as aforesaid, could not maintain her action, judgment was to be entered for the defendant; but, if the court should be of opinion that the verdict should stand, the case was to be referred to an assessor to determine the amount of damages, upon whose award final judgment should be entered.

A. Russ & D. A. Dorr, for the defendant.

C. H. Chellis, for the plaintiff.

GRAY, C. J. The judge rightly refused to rule as requested by the defendant. If the note made by the husband had been indorsed as well as assigned by the payee to the wife, so as to pass both the legal and the equitable title in it to her, the note might, in law at least, have been extinguished, because of her incapacity to be a party to a contract with, or to an action against, her husband. *Chapman* v. *Kellogg*, 102 Mass. 246. *Abbott* v. *Winchester*, 105 Mass. 115. But as the note is only shown to have been assigned to the wife, and does not appear to have been indorsed to her, (and the counsel, upon being inquired of, have stated that no evidence upon this point was introduced,) the note remained in full force, and might have been sued against her husband, in the name of the payee, for her benefit. *Stearns* v. *Bullens*, 8 Allen, 581. *Amherst Academy* v. *Cowls*, 6 Pick. 427. *Tucker* v. *Tucker*, 119 Mass. 79.

By the assignment of the mortgage, the legal as well as the equitable title in the mortgaged property vested in the wife, although she could not, for the like reason, foreclose it while her husband continued to own the equity of redemption. *Stetson* v. *O'Sullivan*, 8 Allen, 321. *Bemis* v. *Call*, 10 Allen, 512. *Tucker* v. *Fenno*,

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110 Mass. 311. *Model Lodging House Association* v. *Boston*, 114 Mass. 133. *Cormerais* v. *Wesselhoeft*, 114 Mass. 550. The wife, being the lawful holder of a mortgage of personal property, duly recorded, might maintain any action necessary to protect her title or possession thereof against a third person. *Boise* v. *Knox*, 10 Met. 40. *Landon* v. *Emmons*, 97 Mass. 37. *Meserve* v. *Meserve*, 63 Maine, 518. And she might well, in her demand upon the attaching officer, under the Gen. Sts. *c.* 123, § 63, describe the sum due upon the note held by the payee for her benefit, and secured by the mortgage held by herself, as due to her upon the mortgage. *Bicknell* v. *Cleverly*, 125 Mass. 164.

The case of *Phillips* v. *Frye*, 14 Allen, 36, cited for the defendant, is essentially different from the case before us. In that case, the note and mortgage executed by the husband to a third person for the benefit of the wife, which were held invalid and incapable of being enforced against the husband's estate after his death, were made in 1853, to secure the repayment to her of money which she had previously applied to the payment of his debts, and which was not shown to have been secured to her sole and separate use, by deed or will, under the St. of 1845, *c.* 208, and which therefore, under the then existing laws, might be reduced to possession or used by the husband, and had, by the payment of his debts, been effectually applied to his use without creating any legal or equitable liability on his part; so that the note and mortgage subsequently executed by him were purely voluntary and without any legal consideration. See 14 Allen, 38; *Alexander* v. *Crittenden*, 4 Allen, 342; *Dunn* v. *Sargent*, 101 Mass. 336.

In the present case, the defendant does not appear to have denied that the wife, under the Gen. Sts. *c.* 108, § 1, had the absolute ownership of the money received by the husband, or that the note and mortgage made by him to secure the payment of that amount to Higgins for the benefit of the wife were originally valid; but the defence appears to have been rested solely upon the position that the note was extinguished by being assigned to the wife. As this defence, for the reasons already stated, cannot be maintained, the case must, according to the terms of the report, be *Referred to an assessor.*

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JAMES W. RICE & another *vs.* NATIONAL BANK OF THE COMMONWEALTH & others.

Suffolk. March 18, 1878. — Feb. 26, 1879. COLT & AMES, JJ., absent.

An information in the nature of a *quo warranto*, under the Gen. Sts. *c.* 145, §§ 16–24, without the intervention of the attorney general, will not lie against the stockholders of a corporation organized under the St. of 1870, *c.* 224, if the forms of law in the organization of the corporation have been complied with, and the certificate issued by the secretary of the Commonwealth, as provided by § 11, although the certificate was obtained by fraud.

INFORMATION, in the nature of a *quo warranto*, filed, by order of court and consent of parties, on November 26, 1877, and containing the following allegations:

That on April 3, 1876, all the property which Ezra D. Winslow had on February 14, 1876, was conveyed and assigned to the relators as his assignees in bankruptcy.

That on said February 14 Winslow owned certain property situated in Boston, of the value of $100,000, being the newspapers known as the Boston Post and the Boston Statesman, with the good-will and bills receivable of the same, and all and singular the stock, types, presses and materials used in publishing the same, and the Associated-Press privilege connected therewith; also the types, presses, stock and materials connected with a job-printing office in said Boston, by Winslow conducted in connection with said papers; also the library, fixtures and all other property connected with and belonging to said papers and job office.

That on May 14, 1875, Ezra D. Winslow, Edward F. Porter and William C. Greene falsely and fraudulently assumed to associate and form a corporation under the laws of this Commonwealth, under the name of the Boston Post Company, for the pretended purpose of publishing and printing papers, and job printing, with a pretended capital stock of $300,000; but no such association was ever made in fact, no capital stock was ever paid in to said assumed corporation, and no such corporation was legally formed, though Winslow, Porter and Greene complied with all the forms prescribed by the statutes of this Commonwealth for the organization of corporations, and a certificate of organization was obtained from the secretary of the Common-

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wealth, in the form prescribed by the St. of 1870, c. 224, § 11, certifying that "E. D. Winslow, Edward F. Porter and W. C. Greene, their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of the Boston Post Company, with the powers, rights and privileges, and subject to the limitations, duties and restrictions which by law appertain thereto."

That Winslow, Greene and Porter did not associate themselves together with the intention to constitute a corporation for the purpose of "the printing and publishing of newspapers and job printing," as in their article of association alleged; but that said association (if any was formed) was for the purpose of enabling Winslow to cheat and defraud the public and such persons as he might be able to induce to purchase stock in said assumed corporation; that said assumed corporation was conceived in fraud, and that said association was not for the real purpose of forming a corporation under the laws of this Commonwealth, but was a fraud and a sham entered into for the real purpose of defrauding such persons as might be induced to become creditors of or stockholders in the same; that any certificate of corporate existence, or grant of corporate powers, which Winslow, Greene and Porter may have obtained, was obtained by fraud, and was of no legal force or validity, and Greene, Winslow and Porter never became a corporation under the laws of the Com monwealth.

That about February 1, 1876, Winslow absconded from the United States, and is now in Europe, a fugitive from justice, and Porter and Greene had long before that time ceased to act or claim to act, or to exercise or claim to exercise any corporate franchise, under the name of the Boston Post Company.

That Greene and Porter were mere nominal parties to said assumed association, having no real interest therein whatever; that Greene was the attorney of Winslow, and whatever part he took in the assumed association was as the attorney of and for the benefit of Winslow; that Porter was not in any way interested in the assumed association, and only acted therein at the request and for the sole benefit of Winslow.

That no stock was ever legally issued in said assumed Boston Post Company, but that said assumed corporation was a fraud

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and a sham, and no persons ever became legal stockholders in any legal company under that name; that, up to the time Winslow absconded, he was in the possession of all the property above described, using and treating it as his own; and immediately upon his leaving the United States, and before the appointment of the relators as his assignees, certain corporations and persons named, claiming to be stockholders in said corporation assumed to have been formed by Winslow, Porter and Greene, and to exercise a corporate franchise by them claimed to have been obtained under the laws of the Commonwealth by Winslow, Greene and Porter, took possession of all said property previously held by Winslow, and held and managed the same under the name and style of the Boston Post Company, and assumed to exercise a corporate franchise as said company; that they thus held and managed said property, and refused to deliver the same to the relators, on demand, till the same was sold and the proceeds, amounting to $60,000, placed in the hands of a trustee to be disposed of as should be adjudged upon proper legal proceedings to determine the title thereto; that said parties now claim to own said proceeds in the hands of such trustee, as said corporation under the name of the Boston Post Company, and have commenced legal proceedings to obtain the same, contending that Winslow, Porter and Greene obtained a certificate of organization from the secretary of the Commonwealth, which has the force and effect of a special charter, and is conclusive evidence of their organization and of the existence of said Boston Post Company as a corporation.

That no such corporation as the Boston Post Company was ever legally formed, no capital stock was ever paid in, and neither Winslow, Porter and Greene, nor any persons claiming to be their successors or assigns, ever had any right to exercise a corporate franchise as the Boston Post Company for the purpose of taking property, doing business, prosecuting or defending suits at law or in equity, or any other purpose whatever under the laws of this Commonwealth; that if the defendants are the assignees of stock in said assumed corporation, they took the same from Winslow for such value and under such circumstances as should have put them upon inquiry as to the legal character and status of the assumed company, and are not in law protected in the enjoyment

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of said franchise any more than the original parties to said fraudulent association.

The prayer of the information was, that due process of law might issue, commanding the defendants to answer by what warrant they claimed to have the said franchise; that they might be restrained from exercising such franchise; and that the attorney general might be notified of the filing and pendency of the information.

The attorney general, having been notified, did not intervene. The defendants demurred to the information, assigning as cause of demurrer that the allegations of the information were not sufficient in law to entitle the relators to the relief sought.

Ames, J., sustained the demurrer, and dismissed the information. The relators alleged exceptions.

J. H. Benton, Jr., for the relators.

H. D. Hyde, C. H. Drew & M. Storey, for the defendants.

GRAY, C. J. At common law, private individuals, without the intervention of the attorney general, cannot, either as of right or by leave of court, file an information in the nature of a *quo warranto*. *Goddard* v. *Smithett*, 3 Gray, 116. The statutes give the right to file such an information only to "any person whose private right or interest has been injured or is put in hazard by the exercise by any private corporation, or persons claiming to be a private corporation, of a franchise or privilege not conferred by law;" and provide that, where an information so filed is sustained, if the attorney general has not intervened, no judgment of forfeiture shall be entered, but only judgment that the corporation, or the persons claiming to be a corporation, be perpetually excluded from the franchise or privilege exercised by them and not conferred by law. Gen. Sts. *c.* 145, §§ 16, 22.

This information seeks to exclude the defendants from exercising the franchise of being a corporation, on the ground that any certificate of corporate existence, or grant of corporate powers, which the persons who undertook to form the corporation obtained, was obtained by fraud. But it shows that those persons complied with all the forms prescribed by the statutes of the Commonwealth for the organization of corporations, and obtained from the secretary of the Commonwealth a certificate under the seal of the Commonwealth, which by the express terms of the general

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statute of 1870, *c.* 224, § 11, "shall have the force and effect of a special charter, and be conclusive evidence of the organization and establishment of such corporation."

It thus appears on the face of the information that the franchise of being a corporation was conferred upon the defendants by law. The defendants having thus once become a legal corporation, their franchise, by the general principles of law, as well as by the provisions of the statute under which the information is filed, could be avoided, annulled, revoked or forfeited only by the Legislature, or at the suit of the Commonwealth or of the attorney general representing the Commonwealth, and not upon the application of private individuals. Gen. Sts. *c.* 68, § 41. *Commonwealth* v. *Union Ins. Co.* 5 Mass. 230. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344, 371. *Folger* v. *Columbian Ins. Co.* 99 Mass. 267, 274. *Hastings* v. *Amherst & Belchertown Railroad*, 9 Cush. 596, 599. *Goddard* v. *Smithett*, 8 Gray, 117. As this reason is conclusive, it is unnecessary to consider other objections to the maintenance of the information.

Exceptions overruled.

SAMUEL C. SMITH *vs.* CHARLES W. EVERETT.

Suffolk. March 28, 1878. — Feb. 26, 1879. COLT & MORTON, JJ., absent.

If a person, by false and fraudulent representations as to the extent of his business, induces another to enter into partnership with him for a definite period, a court of equity has jurisdiction to order the partnership articles to be cancelled, and to restrain the former from using the name of the latter as a partner; and, having obtained jurisdiction for that purpose, may administer complete relief in the same suit by ordering the former to pay the sums advanced or expended by the latter on account of the partnership.

BILL IN EQUITY, filed June 14, 1877, alleging that, in response to an advertisement inserted by the defendant in a Boston newspaper, stating that a partner in business was wanted with a capital of $5000, the plaintiff, being then out of business, and desirous of some employment, called upon the defendant for the purpose of making inquiries as to the advertisement; that at that and subsequent interviews respecting the business, the

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defendant represented to the plaintiff, that the business in which he desired a partner was the manufacture and sale of an article called starchene, or perfumed starch enamel, that the same was valuable, and would prove very profitable to the plaintiff if he entered into it, that the defendant had an established business in Boston, in the sale of the starchene, of fifteen gross bottles per week, that the same would continue and largely increase, that he had sold sixty gross of the same in New York, and had an established agency there and also in Albany, and that the business in these cities was well established and prosperous; that, by these representations, the defendant gained the confidence of the plaintiff, and finally induced him to abandon plans which he had entertained, and had communicated to the defendant, of undertaking other business, and to enter into a partnership with him for the manufacture and sale of starchene, and to pay the defendant the sum of $2000 for one-half interest, so called, in said business, and to enter into articles of copartnership for the term of one year; that the plaintiff paid to the defendant the sum of $2000 in cash for one half interest in said business; that the plaintiff had no means of ascertaining about the business, and the knowledge of the same and of its value was peculiarly in the defendant; that the plaintiff, by the necessity of the case, was obliged, and was induced by the defendant, to rely on these representations; that all the above representations and statements of the defendant were false and fraudulent, and the defendant knew them to be so.

The prayer of the bill was that the articles of copartnership might be cancelled; that an account be taken of the amount paid by the plaintiff to the defendant, and his outlays in said business; that the defendant might be decreed to repay the same to the plaintiff; that the defendant might be restrained by injunction from using the name of the plaintiff in said business, and for general relief.

The defendant demurred to the bill, assigning the following grounds of demurrer: 1. That the plaintiff had a plain, adequate and complete remedy at common law. 2. Multifariousness. 3. Want of equity.

Hearing before *Endicott*, J., who overruled the demurrer. and the defendant appealed to the full court.

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C. J. Noyes, for the defendant.

P. West & J. M. Gould, for the plaintiff.

GRAY, C. J. Upon the allegations in the bill, which are admitted by the demurrer, the defendant, by false and fraudulent representations as to the extent of his business, induced the plaintiff to enter into a partnership with him for a definite period, which would make the plaintiff liable to creditors as a partner. Against such liability by reason of the defendant's fraud, a court of law could afford the plaintiff no adequate remedy. Equity has therefore jurisdiction to order the partnership articles to be cancelled, and to restrain the defendant from using the plaintiff's name as a partner; and, having obtained jurisdiction for that purpose, may administer complete relief in the same suit, by ordering the defendant to repay the sums advanced or expended by the plaintiff on account of the partnership. *Pillans* v. *Harkness*, Colles, 442. *Ex parte Broome*, 1 Rose, 69. *Rawlins* v. *Wickham*, 3 DeG. & J. 304. *Jauncey* v. *Knowles*, 29 L. J. (N. S.) Ch. 95. Story Part. §§ 282, 285. *Decree affirmed.*

BRIDGET MCCLUSKEY *vs.* PROVIDENCE WASHINGTON INSURANCE COMPANY.

Suffolk. Nov. 15, 1878. — Feb. 26, 1879. COLT & MORTON, JJ., absent.

If, when a policy of insurance is issued, the person whom it purports to insure against loss has previously conveyed his interest in the property insured, the policy is void in his hands, and an assignment on the policy at the time it is issued of all his interest in the policy to the grantee, assented to by the insurance company, does not create a new and independent contract of insurance between the company and the grantee; and parol evidence is inadmissible to show that all the facts were communicated to the agent of the company, and that the assignment was drawn by the agent to make it, as he said, all right.

CONTRACT. The declaration alleged that on July 27, 1876, the defendant delivered to Margaret E. Kinney a policy of insurance against fire, for the term of one year, beginning July 21, 1876, whereby the defendant agreed to insure said Kinney, on certain buildings, in the sum of $1500, against loss by fire;

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that on November 3, 1876, the policy was assigned to the plaintiff, the property having been conveyed to her with the assent of the defendant; that the property insured was destroyed by fire on July 1, 1877, and due notice and proof of loss given to the defendant. The answer denied that Kinney had any insurable interest at the time the policy was delivered; and that the assignment was valid.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff put in evidence a deed of the insured premises from Kinney, dated June 13, 1876, and offered evidence tending to show that it was executed and delivered to the plaintiff at that time. She also put in evidence the policy declared on, which purported to take effect on July 21, 1876, the time of the expiration of a previous policy on the premises also running to Kinney. On the policy was the following indorsement: "Boston, Nov. 3, 1876. Having sold the within insured premises to Bridget McCluskey of Boston, I hereby assign to her all my interest in this policy of insurance. Margaret E. Kinney. Assented to. Cyrus Brewer, agent."

Kinney testified that, being in the office of the defendant's agent a day or two prior to November 3, 1876, one Pope, a person employed in the office as agent of the company, told her there was a policy there on the premises in question unpaid for, and she replied that she would see the owner and have it attended to; that on November 3, 1876, having obtained the money for the premium of the plaintiff, she returned to the office of the agent and gave him the money; that he thereupon handed the policy to her, which she examined, and said to him that it was not right, that she had sold the premises to the plaintiff, and that a new policy should be made out; that Pope then said he would make it all right, and thereupon drew the assignment appearing upon the policy, handed it to her and told her to sign it, which she did; and that Pope then procured the assent of the proper officer of the company to be put to it; the money for the premium was retained, and the policy was delivered to Kinney. This evidence was admitted, against the defendant's objection.

The judge instructed the jury that, as Kinney, on the day of the date of the policy, had no insurable interest in the property

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covered by it, the policy was void, and no recovery could be had upon it, either by her or her assignee, for a loss under it; but that, if the defendant, knowing all the facts, and knowing that this transfer had been made before the date when the policy was issued, consented to the assignment, and received the premium at that time, and delivered the policy to Kinney for the plaintiff, telling her it was all right, and giving her to understand that that was all that was necessary to make it a good policy, it was evidence of an assent, on the part of the defendant, that the policy, otherwise void, should be treated as a new and operative instrument in the hands of the plaintiff.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

R. Olney & F. I. Amory, for the defendant.

B. E. Perry & S. W. Creech, Jr., for the plaintiff.

SOULE, J. When the policy sued on was issued, Kinney, the person whom it purported to insure against loss, had no insurable interest in the property, and the policy was therefore void in her hands. The assignment of all her interest in the policy to the plaintiff, assented to by the defendant, did not create a new and independent contract of insurance between the parties to this action. The plaintiff took by the assignment only such rights as Kinney had under the policy. *Bowditch Ins. Co.* v. *Winslow*, 8 Gray, 38. *Loring* v. *Manufacturers' Ins. Co.* 8 Gray, 28. *Lawrence* v. *Holyoke Ins. Co.* 11 Allen, 387. No new consideration passed to the defendant, and it did not make any new undertaking beyond that of substituting the plaintiff for Kinney in the existing contract. The case differs in this from the cases in which assignees of policies of mutual insurance companies have given new premium notes or assumed old ones, in consideration of the assent of the companies to the assignment; *Foster* v. *Equitable Ins. Co.* 2 Gray, 216; and from the cases in which the company agrees in writing that the policy shall continue in force to the assignees. *Tripp* v. *Pacific Ins. Co.* 7 Allen, 230.

The contract being in writing, parol evidence to vary it was inadmissible. *Barrett* v. *Union Ins. Co.* 7 Cush. 175. The action is based on the policy as it was written, and cannct be maintained by evidence that the contract was intended by the plaintiff or her assignor to be a different one. If there was a mistake in

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the written contract, it cannot be rectified in this action. The learned judge, who tried the case in the Superior Court, erred in ruling that the facts testified to, as to the knowledge of the defendant and the payment of the money, and the representation that all had been done which was necessary to make the policy a good one, were evidence of an assent by the defendant that the policy, otherwise void, should be treated as a new and operative instrument in the hands of the plaintiff.

Exceptions sustained.

PETER J. DONAHER *vs.* CITY OF BOSTON.

Suffolk. Nov. 18, 1878. — Feb. 26, 1879. COLT & MORTON, JJ., absent

If a sub-contractor agrees to furnish all the hammered granite for a building for an entire sum, and has no lien for the stone, on account of his failure to give the owner the notice required by the Gen. Sts. c. 150, § 2, he has no lien under the St. of 1872, c. 318, § 1, for the labor performed in hammering the stone.

PETITION to enforce a mechanic's lien for labor performed in the erection of a building on land of the respondent. At the trial in the Superior Court, before *Rockwell*, J., the jury returned a verdict for the petitioner; and the respondent alleged exceptions, the material parts of which appear in the opinion.

R. D. Smith, for the respondent.

G. W. Morse & J. C. Lane, for the petitioner.

SOULE, J. The petitioner made a contract with one Pierce to deliver to him all the hammered granite required for a school-house on Francis Street, in process of erection on land of the city of Boston, for an entire price. Pierce was employed by the city under a written contract to erect the building. The petitioner gave no notice that he should claim a lien for materials furnished. The granite was wrought at Quincy, and so much of it as was delivered under the petitioner's contract with Pierce was delivered at the school-house. Till thus delivered, it was the property of the petitioner; and, after delivery, it was the property of Pierce, which he might use in erecting the school-house or for any other purpose, so far, at least, as the city of Boston was concerned. Under these circumstances, we are of

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opinion that the petitioner has no lien for labor performed in preparing the granite, as labor performed or furnished in erecting the school-house. He merely furnished material wrought to a stipulated condition for a stipulated price. The St. of 1872, *c.* 318, § 1, which provides that, under certain specified conditions, a lien may be maintained for labor performed under an entire contract for labor and materials, was not intended to reach cases in which finished articles of merchandise have been sold at a fixed price to a contractor. The labor performed by the petitioner at the premises was merely in completion of his contract to furnish granite wrought to a certain condition. The learned judge of the Superior Court erred, therefore, in refusing to rule on this point, as requested by the respondent, that the petitioner had furnished no labor upon the building for which he was entitled to a lien. *Exceptions sustained.*

MAURICE O'CONNELL *vs.* THOMAS E. HOVEY & another.

Suffolk. Nov. 18, 1878. — Feb. 26, 1879. COLT & MORTON, JJ., absent.

In an action on a recognizance entered into under the Gen. Sts. *c.* 124, § 10, the declaration alleged that A. was arrested on an execution in favor of B., and entered into the recognizance declared on; that, within the thirty days, he was examined by B., who filed charges of fraud against him; that, without pleading to the charges, he requested a continuance of the case that he might, in the mean time, have an opportunity of paying the debt, to which B. assented; that, at the request of A., the case was continued from time to time during a period of more than three years, for the same purpose; that during this period he did not submit himself to be further examined, nor did he plead to the charges against him, but at each continuance promised to pay the debt within the time for which the case was continued; and that, on a certain day, to which the case had been continued, he presented himself before the magistrate, B. not being present, having no notice that A. intended to then take the oath for the relief of poor debtors, and had the oath administered to him, and obtained his discharge. *Held*, on demurrer, that there was no breach of the recognizance.

CONTRACT on a recognizance entered into on April 30, 1873, under the Gen. Sts. *c.* 124, § 10, by the first-named defendant as principal, and the other as surety, and containing the usual conditions.

The declaration alleged that Hovey was arrested on an execu-

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tion duly issued on a judgment in favor of the plaintiff, and entered into the recognizance declared on; that Hovey, within the thirty days, the plaintiff having been notified of the time and place, presented himself for examination before a magistrate; that on his examination, it being disclosed that since his arrest, and before, since the debt to the plaintiff was contracted, he had squandered and misused his property, the plaintiff thereupon filed charges of fraud against Hovey; that the latter, without pleading to the charges, requested an adjournment and continuance of the case, that he might, in the mean time, have an opportunity of paying the debt, to which the plaintiff assented; that, at the request of Hovey, from time to time, and at each time made before the magistrate, the matter was continued during a period of three and one half years, and always to give Hovey opportunity and time to pay the debt, which at each continuance he promised to pay; that at no time during this period did Hovey submit himself to be examined, or signify his intention of being further examined, nor did he, in the mean time, plead to the charges of fraud filed against him, but at each continuance promised to pay the debt within the time for which the case was continued; that on a day in December 1876, to which day the case had been continued, Hovey presented himself before the magistrate, the plaintiff not being present, having no notice of Hovey's intention of then taking the oath for the relief of poor debtors, and had the oath administered to him, and was thereupon discharged by the magistrate; that this action and conduct of Hovey was intended to mislead and defraud the plaintiff, and was in bad faith; that his discharge was a fraud on the plaintiff, and invalid; that the above action and conduct of Hovey constituted a breach of the recognizance, and was a default; and that the defendants had, by the default and fraud of Hovey, forfeited to the plaintiff the amount conditioned in the recognizance, and owed the plaintiff said amount.

The defendants demurred to the declaration, assigning as cause of demurrer, that it did not set forth a legal cause of action. The Superior Court sustained the demurrer; and ordered judgment for the defendants. The plaintiff appealed to this court.

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A. Russ, for the plaintiff.

H. H. Mather, for the defendants.

SOULE, J. The plaintiff's declaration shows that all the proceedings after the recognizance was taken, and the notice of Hovey's intention to take the oath was given, were had with the knowledge and consent of the plaintiff, down to and including the adjournment of the proceedings to the day when the oath was administered. If a strict compliance with the statute required, as the plaintiff contends, that Hovey should at once plead to the charges of fraud filed, his failure to do so cannot be availed of by the plaintiff, because he alleges that the several continuances were made before Hovey pleaded, with his consent. On the day when the oath was administered the case stood thus: The plaintiff had examined the debtor so far as he saw fit to, and had filed charges of fraud which he had permitted to lie without plea for three years and more. At the time and place to which the hearing was adjourned, the debtor appeared, but the plaintiff did not. This was an abandonment of his charges, and of all opposition to the discharge of the debtor. The allegations of the declaration as to the promises of the debtor to pay the execution do not change the legal aspect of the case. And nothing is alleged which indicates any reason why the magistrate should not have decided that the plaintiff was in default. Nor is it alleged that the debtor said or did anything which was designed to induce or did induce the plaintiff to absent himself from the hearing.

The material allegations of the declaration fail to set out any breach of the recognizance. If it would have been more regular for the magistrate to require a plea to the charges of fraud, and to make a finding upon them, before administering the oath, the irregularity was one for which the debtor was not responsible. *Willis* v. *Howard*, 7 Allen, 266. *Judgment affirmed*

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ISAAC FARRINGTON *vs.* DAVID F. KIMBALL.

Suffolk. March 19, 1878. — Feb. 28, 1879. AMES & MORTON, JJ., absent.

A lessee of land, who has not paid the rent reserved in the lease, cannot maintain an action against an assignee of the lease for such rent.

CONTRACT for use and occupation of a store in Boston from April 27 to September 27, 1876. Answer, a general denial. Trial in the Superior Court, without a jury, before *Aldrich*, J., who allowed a bill of exceptions in substance as follows:

Joseph H. Hunneman, on September 1, 1871, executed a written lease of the store in question to the plaintiff, for the term of five years from that date. By the terms of the lease the lessee agreed to pay as rent $600 yearly in equal monthly instalments, during the term and for such further time as he, or any person claiming under him, should hold the premises. The lessee also covenanted not to assign the lease without the assent of the lessor in writing. In 1872, the plaintiff assigned in writing all his right, title and interest in the lease to Farrington and Kent, who in 1873, made a similar assignment to G. F. Farrington, who in 1875 made a similar assignment to William A. Thomes. On April 27, 1876, Thomes was adjudged a bankrupt, and, on June 14, 1876, the defendant was appointed assignee of his estate. From April 27 to June 14, 1876, the messenger in bankruptcy was in occupation of the store, and, from the latter date to September 27, 1876, the defendant was in occupation of it.

The plaintiff paid Hunneman the rent of the store for the months of March, April and May 1876; and Hunneman has not released the plaintiff from his liability to pay all the rent due and unpaid. Hunneman did not assent to any of the above assignments of the lease, and at no time recognized the defendant as his tenant or claimed rent of him.

The defendant asked the judge to rule that the plaintiff had no claim against the defendant; that if the plaintiff could have a right of action against the defendant, it would only arise when the plaintiff had paid Hunneman the rent due under the lease, and thus extinguished Hunneman's right against the defendant.

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The judge refused so to rule; ruled, as matter of law, that, on the facts found, the plaintiff could maintain the action; and found for the plaintiff in the full amount claimed. The defendant alleged exceptions.

D. F. Kimball, pro se.

J. P. Farley, Jr., for the plaintiff.

ENDICOTT, J. When a lessee assigns his entire interest in the estate, he is still liable to the lessor on his covenants to pay rent; and the assignee is also liable to the lessor for the performance of all the covenants which run with the land by virtue of the privity of estate created by the assignment. *Wall* v. *Hinds*, 4 Gray, 256. *Blake* v. *Sanderson*, 1 Gray, 332. *Sanders* v. *Partridge*, 108 Mass. 556. Both are liable, and the lessor has the option to sue either. When the lessee is obliged to pay, by reason of his covenants to pay rent, the question arises, what are his rights against the assignee who has not performed his duty, but has taken the whole benefit of the lease.

It was said in general terms by Chief Justice Shaw in *Patten* v. *Deshon*, 1 Gray, 325, 330, that "the first lessee, notwithstanding the assignment, remains liable for the rent, in virtue of his express covenants, if the lessor elects so to hold him, in which case he will be entitled to the rent from the assignees." The leading case in England is *Burnett* v. *Lynch*, 5 B. & C. 589, where it was held that a lessee, who had assigned the lease by a deed poll, and had been compelled to pay damages to the lessor for breach of the covenants of the lease while his assignee was in occupation, could maintain an action against the assignee for having neglected to perform the covenants, whereby the lessee suffered damage. Lord Denman, in commenting on this case, when delivering the judgment of the Exchequer Chamber in *Wolveridge* v. *Steward*, 1 Cr. & M. 644, 660, stated that "the effect of the assignment is, that the lessee becomes a surety to the lessor for the assignee, who, as between himself and the lessor, is the principal, bound, whilst he is assignee, to pay the rent and perform the covenant running with the estate; and the surety, after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal. And he would also, in all probability, have the same remedy over against each subsequent assignee, in respect of breaches committed during the

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continuance of the interest of each; for the lessee is, in effect, a surety for each of them to the lessor." And Baron Parke, who took part in that judgment, afterwards, in *Humble* v. *Langston*, 7 M. & W. 517, 530, also expressed the opinion that the lessee was liable in the nature of a surety, as between himself and the assignee, for the performance of the covenants of the lease.

In *Moule* v. *Garrett*, L. R. 5 Ex. 132, the assignee, for whose breach of the covenants of the lease the lessee was obliged to pay, did not take directly from the lessee, but was second assignee, and the question suggested by Lord Denman arose, as it does in the case at bar. It was held that there was an implied promise on the part of each successive assignee of a lease to indemnify the original lessee against breaches of covenant in the lease committed by each assignee during the continuance of his own term. The decision was afterwards affirmed in the Exchequer Chamber. L. R. 7 Ex. 101. Chief Justice Cockburn, while conceding that the defendants might be held on the ground of the implied contract, was of opinion that the liability of the assignee might be put on another and preferable ground, namely, that when one person is compelled to pay damages for the legal default of another, he is entitled to recover, from the person by whose default the damage was occasioned, the money so paid, and that it was a matter of indifference whether the liability rested on an implied contract or on an obligation imposed by law; it was a duty the law enforces. Mr. Justice Willes stated his concurrence in this concise language: "I am of the same opinion, on the ground that where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation."

Assuming, therefore, that a lessee may maintain an action against an assignee, on either of the grounds suggested in these cases, it is very clear that he can only do so after he has paid the lessor for breach of the covenants of the lease by the assignee. If he is a surety, then he must pay the debt for which he is liable before he can recover of the principal. *Hoyt* v. *Wilkinson*, 10 Pick. 31. If it is a debt imposed upon him by the default

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or act of the assignee, it must of course be discharged before the liability of the assignee accrues. The ruling, therefore, of the presiding judge, which allowed the plaintiff to recover for monthly instalments of rent which he had not paid, was erroneous. No question of pleading was raised.

Exceptions sustained.

JOHN L. WOOD *vs.* FIREMEN'S FIRE INSURANCE COMPANY.

Suffolk. March 26, 1878. — Feb. 28, 1879. AMES & MORTON, JJ., absent.

A policy of fire insurance on oil paintings, each valued at a certain sum, contained on its face an agreement that the representation given in the application for the insurance contained a true exposition of all the facts and circumstances in regard to the value of the property insured, and that, if any material fact or circumstance should not have been fairly represented, the policy should be void. The written application stated that the original of one of the paintings was by Leonardo da Vinci; that it was then in the Vatican or in one of the churches at Rome, under the care of the Pope, and could not be bought for $1,000,000; that the copy was the only one in America, and no other copy could ever be allowed by the Pope. In an action on the policy, the jury were instructed that the representations as to the origin and character of the painting were material to the risk, and if falsely and fraudulently made, and if relied on by the insurer, would avoid the policy. At the close of the charge, the defendant requested the judge to rule, that if the statements were in fact untrue, and the insurer relied on the truth of the statements, the plaintiff could not recover; that this was so, even if he believed the statements to be true; that the representations as to the origin and character of the picture were material to the risk; and, if not true, the policy was void. The judge gave the first two instructions, with the addition to each, "provided these statements were false and fraudulent;" and, in regard to the last, replied, "I have already given that." *Held*, that the plaintiff had no ground of exception.

If a policy of fire insurance contains a clause providing that any person other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured, the assured is bound by representations made by an insurance broker, who procures the insurance, notwithstanding the St. of 1861, c. 170.

On the question whether an oil painting was fraudulently overvalued in a policy of insurance, the insured cannot give in evidence offers for the picture made after the policy issued.

COLT, J. The plaintiff by one Bean, an insurance broker, procured a policy of insurance in the defendant company, upon several oil paintings in his dwelling-house, the estimated value

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of each being stated in the policy. At the end of a written application for insurance, given by the plaintiff to Bean, and exhibited by the latter to the president of the company, was a written statement that the original of one of the paintings, called "Christ crowned with Thorns," was by Leonardo da Vinci, that it was then in the Vatican or in one of the churches at Rome, under the care of the Pope, and could not be bought for $1,000,000; that this copy by Pinnol de T. Salos was the only one in America; and no other copy could ever be allowed by the Pope.

The policy contained on its face the following clause: "And the assured hereby covenants and engages, that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that, if any material fact or circumstance shall not have been fairly represented," "the risk hereupon shall cease and determine, and the policy be null and void."

At the trial, the judge instructed the jury, in substance, that the representations made by Bean when the policy was issued, as to the origin and character of the painting referred to, were material to the risk; and if falsely and fraudulently made, and if relied on by the insurer, and found to be untrue, would avoid the policy. The jury were also told, that the mere expressions of opinion and belief were not to be taken as misrepresentations of fact. These instructions were sufficiently accurate. If the question of the materiality of the representations is open to the plaintiff on the bill of exceptions, yet the instructions given afford no valid ground of objection. The policy was a valued policy. The representations related to the origin of the painting, and were written statements of facts which, if true, would give peculiar value to it, as the only copy which could ever be had of an original painting of great merit, by one of the most famous of the old masters. They were calculated to induce the defendant company to take a risk by a valued policy for the sum named in it, which it would otherwise have declined or taken only for a smaller amount. Facts stated in regard to the value of the property insured are made material by the terms of the policy.

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The statements relied on are in writing, and their interpretation, like that of other written instruments, is for the court. There is no disputed fact left for the jury, upon which they could be permitted to find that the representations were not made, or that they were not material. *Fletcher* v. *Commonwealth Ins. Co.* 18 Pick. 419. *Campbell* v. *New England Life Ins. Co.* 98 Mass. 381. *Lewis* v. *Eagle Ins. Co.* 10 Gray, 508.

We find nothing in the propositions stated by the judge at the close of his charge, in answer to requests then made, inconsistent with these instructions, or calculated to mislead the jury.*

The plaintiff excepted to the judge's refusal to instruct the jury that Bean was not to be regarded as his agent touching

* At the close of the charge the defendant presented to the judge the following, among other requests for instructions:

"4. That if the jury shall find that Bean represented to the president of the defendant company that this painting was a copy of a picture by Leonardo da Vinci, that the original was in the Vatican, at Rome, or in one of the churches there under the care of the Pope, that the original could not be bought for $1,000,000, and that no other copy could ever be allowed by the Pope, or that Bean handed to the president a paper containing these statements, and if the jury shall find that these statements were in fact untrue, and that the president relied on the truth of these statements when he issued the policy, then the plaintiff cannot recover anything on this policy.

"5. That if the jury shall find that Bean represented to the president that this painting was a copy of a picture by Leonardo da Vinci, that the original could not be bought for $1,000,000, and that no other copy could ever be allowed by the Pope, or that Bean handed to the president a paper containing these statements, and if the jury shall find that these statements were in fact untrue, and that the president relied upon the truth of these statements, then the plaintiff cannot recover anything on this policy, even though the plaintiff believed these statements to be true."

"9. That the representations made by Bean to the company as to the origin and character of the picture were material to the risk assumed; and if not true, the policy is void."

The first and second of the instructions so requested were given, with the addition to each, "provided these statements were false and fraudulent;" and with this addition to the second, "If the representations did not affect the policy one way or the other, and if the policy would have been issued whether they had been made or not, of course they become immaterial." As to the third instruction requested, the judge stated to the jury, and it was his only statement in response thereto, "I have already given you that."

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representations made by him in obtaining the insurance. He insists that the question should have been submitted to the jury as a question of fact, upon which there was conflicting evidence. But the policy under which the plaintiff claims to recover provides that "any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed in all cases, and under all circumstances, to be the agent of the assured named in this policy." There was no evidence, nor was it contended, that Bean was an agent of the company, who had authority to make insurance or to bind it by contract in any form. The plaintiff accepted a contract containing the above stipulation, and is bound by it. The St. of 1861, *c.* 170, relating to agents of insurance companies, does not change the rules of the common law regulating the power of agents to bind their principals. It only defines what classes of persons shall be deemed so far agents of insurance companies as to be liable to the penalty prescribed by the Gen. Sts. *c.* 58, § 77. The statute cannot be construed to prevent Bean from being an agent of the plaintiff so far as the making of these representations is concerned, even if, for other purposes, it made him the agent of the insurance company. He might well be the agent of each in matters which did not conflict. *Harrison* v. *City Ins. Co.* 9 Allen, 231. *Markey* v. *Mutual Benefit Ins. Co.* 103 Mass. 78, 98.

The judge admitted evidence of certain offers to purchase this picture made to the plaintiff and refused before the policy was issued, as bearing upon the good faith of the plaintiff in fixing upon the value named in the policy. He properly excluded offers to purchase made afterwards. Such private offers and refusals in reference to articles of this description are not admissible as evidence of actual value at any time; and, upon the question of good faith on the part of the plaintiff at the time the contract was made, offers made and refused afterwards were clearly inadmissible. *Whitney* v. *Thacher*, 117 Mass. 523. *Fowler* v. *County Commissioners*, 6 Allen, 92.

Exceptions overruled.

J. S. Abbott, for the plaintiff.

N. Morse & E. W. Hutchins, for the defendant

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JOHN W. THOMAS *vs.* ALPHEUS P. BLAKE.

Norfolk. Jan. 23, 1878.—Feb. 28, 1879. LORD & SOULE, JJ., absent.

A bond given by a deputy sheriff to a sheriff recited the appointment of the former by the latter, but did not state the time of appointment or term of office. The condition of the bond was, that, if the deputy shall faithfully perform the duties of his office, and save the sheriff harmless from all judgments, costs and expenses which may at any time happen to him, or to which he may be subjected in any manner in consequence of said appointment, the bond was to be void; otherwise, to remain in force. Prior to the execution of the bond, the deputy attached property on a writ and sold it, under the Gen. Sts. *c.* 123, § 72. The case was settled before entry, and the writ was not returned to court. The deputy refused, on demand, to deliver the proceeds of the property sold. After the execution of the bond, the owner of the property sold sued the sheriff for the default of his deputy, and recovered judgment against him, which was paid. *Held*, that an action by the sheriff against a surety on the bond could not be maintained.

CONTRACT upon a bond, dated April 13, 1874, executed to the plaintiff by Henry A. Darling, as principal, in the sum of $5000, and by the defendant and others as sureties, in the sum of $500 each, and containing the following condition:

"The condition of this obligation is such, that whereas the said John W. Thomas, who is sheriff for said county of Norfolk, hath made, constituted and appointed the above-named Henry A. Darling a deputy sheriff under him the said John W. Thomas, sheriff as aforesaid; now, if the above-named Henry A. Darling shall well, punctually and faithfully discharge and perform all the services and duties incumbent on him as a deputy sheriff, as aforesaid, and shall save said John W. Thomas, his heirs, executors and administrators, and each and every of them, harmless and fully indemnified from all judgments, damages, costs, trouble, labor, expenses and disbursements of every kind which may at any time arise, happen or accrue to him, them or either of them, or which he, they or either of them may make, sustain or be subjected to in any manner by means or in consequence of the appointment of the said Henry A. Darling by the said John W. Thomas to the office of deputy sheriff aforesaid, then this obligation is to be void and of no effect; otherwise, to be and remain in full force, power and virtue."

At the trial in the Superior Court, before *Bacon*, J., the jury

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returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

E. Avery & W. H. H. Andrews, for the defendant.

F. D. Ely, (*C. A. Mackintosh* with him,) for the plaintiff.

COLT, J. The bond was delivered to the plaintiff in May 1874; it recites that Darling had been appointed a deputy under the plaintiff; but neither the date of the appointment nor the term of office is stated, nor does it appear from the bond that Darling had, at the time it was executed, delivered and accepted, been qualified and entered upon the duties of the office.

At the trial there was evidence that Darling, in January 1874, attached personal property belonging to Benjamin Gray, on a writ in favor of Lydia M. Runey, which in the same month he sold on the writ, under the provisions of the Gen. Sts. *c.* 123, § 72, requiring him to hold the proceeds of the sale subject to the attachment, to be disposed of as the property would have been disposed of if unsold. There was evidence tending to show that the parties settled the case some time in February, or at least before the first Tuesday in April following, when the writ was returnable. The action was never entered in court, and Darling never completed his return on the writ. This in itself was a dissolution of the attachment. Before the execu tion and delivery of the bond, Gray many times demanded of Darling the money received from the sale of his property, one such demand being made as late as April 20, 1874. These demands, Darling, without excuse, failed to comply with, although, upon the dissolution of the attachment, it was the officer's duty to return the money to the defendant in the writ. The plaintiff was notified of the default of his deputy; and a suit thereon was brought against him in July 1874, upon which a judgment in Gray's favor was recovered in the early part of 1876, and paid on execution soon after.

The question is, whether the facts which this evidence tends to establish show any misconduct or default in Darling, for which the defendant is liable on this bond. And that depends upon the construction which must be given to the bond in suit.

In ascertaining the liability of sureties for the misconduct of their principals, it is sometimes said that the contract must receive a strict interpretation; *Miller* v. *Stewart*, 9 Wheat. 680,

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703; and that sureties cannot be held for the previous defalcations of their principals, unless that responsibility is clearly expressed in the bond, or, as was said in *Farrar* v. *United States*, 5 Pet. 373, 389, "If intended to cover past dereliction, the bond should have been made retrospective in its language."

But whether sureties are entitled to any more favorable rule of interpretation than parties to all other contracts, there is nothing in the language of this contract which can be fairly construed to charge the defendant with any liability except such as might arise from the future acts of the deputy. It does not appear from anything in the bond itself that Darling had at that time transacted any business under the appointment referred to, nor was it shown that the sureties had knowledge from other sources that he had begun to act under it. The bond is in a form which the sheriff might properly have required when the deputy was first appointed. The words of the condition imply that it was intended to secure future good conduct only; they require that the deputy shall faithfully perform his duties, and shall save the plaintiff harmless from claims against him in consequence of his appointment to the office of deputy sheriff. We refer to several cases in which this construction has been given to bonds in which similar language is used.

In *Farrar* v. *United States*, above cited, the bond recited that the President had appointed one Rector surveyor of public lands, and was conditioned to secure the faithful discharge of the duties of his office. It was said, that, for any sums received by Rector prior to the execution of the bond, the sureties could be held answerable only on the ground that at the time the bond was given the surveyor still held the money in bank or otherwise. If still in his hands, he was bailee to the government. If he had parted with it, he had become a debtor or defaulter to the government, and his offence was already consummated, and the sureties had not undertaken for his past misconduct. See also *Rochester* v. *Randall*, 105 Mass. 295, 297; *Franklin Bank* v. *Cooper*, 36 Maine, 179, 192.

In *United States* v. *Boyd*, 15 Pet. 187, and 5 How. 29, the bond recited that Boyd had been appointed receiver of public moneys for the term of four years from a date which was some six months prior to the giving of the bond. It was conditioned

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to be void if Boyd should faithfully perform the duties of his office. And it was held that the sureties were not responsible for defalcations between the date of the appointment and the date of the bond.

In *United States* v. *Linn*, 1 How. 104, a bond, dated in August 1836, recited that Linn had been appointed receiver for a term of four years, by commission dated in February 1835, and was conditioned to be void if Linn should faithfully discharge the duties of his office. It was alleged in one of the counts, that Linn received moneys within the four years' term of his office, which he failed to pay over when requested. It was held that the count was bad, without a direct allegation that the money was received by him after, or was in his hands at, the date of the bond.

In *Bruce* v. *United States*, 17 How. 437, Bruce was appointed an Indian agent in 1840, and reappointed in 1844, and, on each occasion, gave bond with sureties for the faithful performance of the duties of his office. At the trial of an action on the second bond, it was ruled that "if, when Bruce was reappointed agent in 1844, he had moneys in his hands of the United States which he received as agent under his previous commission, then he was bound to apply and account for such moneys under the second commission, and his sureties are bound under the bond which is sued on; but if Bruce had appropriated the moneys received under the previous commission to his own use when this bond was given, then the first set of sureties are responsible for the moneys thus illegally appropriated, and these defendants are not liable, and the burden of proof is on the defendants to show that Bruce had illegally appropriated the moneys before the bond sued on was given." And this ruling was approved by the Supreme Court.

In the case at bar the jury would be justified in finding, upon all the evidence, that Darling, by refusing to pay over the money to the party entitled to it, had fully converted the proceeds of the sale on the writ to his own use before the bond was executed; for any such conversion his sureties would not be liable.

The subsequent recovery of judgment against the sheriff for this misconduct is not a breach of the bond. The condition to save harmless from all judgments which may at any time be

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recovered in consequence of Darling's appointment to the office of deputy sheriff plainly means judgments recovered for acts of misconduct which may occur after the execution of the bond, and against which it was the intention of the bond to protect the plaintiff. If it was intended to include judgments recovered upon past transactions, a surety has the right to insist that such intention should clearly appear. The words of the condition are fully satisfied by the construction we give to it.

In the last request for instructions, the defendants asked the court to rule, in substance, that the defendant would not be liable, if the conversion of the proceeds of the sale by Darling was before the bond was executed. The court erroneously declined to give this instruction. *Exceptions sustained.*

JAMES B. HAND *vs.* INHABITANTS OF BROOKLINE.

Norfolk. Jan. 23, 1878. — Feb. 28, 1879. LORD & SOULE, JJ., absent.

A town, which accepts a statute authorizing it to lay and maintain water-pipes for the purpose of supplying the inhabitants thereof with water, at rates established by the town, is liable for an injury sustained by a traveller upon a highway of the town which has been undermined by water escaping from the pipes by reason of negligence in their construction, although the circumstances are such that no action lies for a defect in the highway under the Gen. Sts. c. 44, § 22.

An expert, who has heard so much of the testimony of a previous witness as is material to the subject-matter of the inquiry, may be interrogated thereon.

In an action for an injury caused by a leak in a joint in a water-pipe under ground, an expert may be asked what the condition of the pipe after the accident, as described by another witness, indicated as to the original construction of the joint; and whether pipe, situated as this was, could be affected by contraction and expansion from the time it was laid until the time of the accident.

GRAY, C. J. In November 1875, the plaintiff, while travelling with due care in a wagon upon a highway in the defendant town, suffered injury by reason of his horse suddenly breaking through the surface of the highway. The declaration contains two counts: the one upon the Gen. Sts. c. 44, § 22, for a defect in the highway which the town was bound to keep in repair; the other at common law, for neglect in the construction of water-pipes, (which the town was authorized by the St. of 1872, c. 343, to lay

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and maintain for the purpose of supplying water to the town, and to owners of buildings therein, at rates established by the town,) whereby the water escaped and undermined and washed away the earth under the highway. It having been conceded by the plaintiff, and ruled by the Superior Court, that the plaintiff could not recover under the first count, and a verdict having been returned for him on the second count only, the question before us is whether the action can be maintained upon this count.

The cause of action set forth in this count is not the omission to perform the duty, imposed by general laws upon all cities and towns alike, of keeping the highways in repair; but it is the neglect in the construction of works which the town had been authorized by a special statute, voluntarily accepted, to construct and to receive profits from, just as a private corporation might. For a neglect in the manner of constructing such works, by which injury is caused to person or property, a town is just as liable as a private corporation or an individual. *Scott* v. *Mayor, &c. of Manchester*, 1 H. & N. 59, and 2 H. & N. 204. *White* v. *Hindley Local Board*, L. R. 10 Q. B. 219. *Bailey* v. *Mayor, &c. of New York*, 3 Hill, 531, 539, and 2 Denio, 433. *Aldrich* v. *Tripp*, 11 R. I. 141. *Oliver* v. *Worcester*, 102 Mass. 489, 501. *Hill* v. *Boston*, 122 Mass. 344, 358, 359, 365, 366, 374, 375, 377. *Murphy* v. *Lowell*, 124 Mass. 564.

If the water escaping from the aqueduct by reason of its negligent and imperfect construction had injured buildings or crops, there could be no doubt of the right of the owner to recover damages against the town. The fact that the injury occasioned was within the limits of a highway, where the person injured had a lawful right to be, affords no ground for exempting the town from this liability.

The right of action against a city or town for a defect in a highway is, as has been repeatedly affirmed by this court, created and limited by the statutes. Gen. Sts. *c.* 44, § 22. But those statutes do not affect the common-law liability of owners of aqueducts for damages caused by negligence in their construction. If the water-works under the highway in Brookline had been constructed by an aqueduct corporation or by the city of Boston under authority of the Legislature, and for the pur-

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pose of supplying water at certain rates or rents, the corporation or the city would clearly be liable in an action like this; and the town of Brookline is not the less liable for an injury resulting from a neglect in the construction of its water-works, because it happens to be also the town in which the highway is situated, and which is bound by general statutes to keep that highway in repair.

The reasons on which it was held in *Williams* v. *Hingham & Quincy Bridge & Turnpike*, 4 Pick. 341, that the statutes, defining and limiting the liability of a turnpike corporation for injuries suffered by travellers in consequence of its neglect to keep its road in repair, had taken away its liability to an action at common law for such a neglect, have no application to the second count in the present case, in which, as we have seen, the ground of action is not the defect in the road, but the defect in the water-works. In *Monies* v. *Lynn*, 121 Mass. 442, and 124 Mass. 165, the action was under the statute for a defect in the highway, and not at common law for a defect in an aqueduct or pipe owned by the city.

The exceptions to the testimony of Jones cannot be sustained. The bill of exceptions does not show that any objection was taken at the trial to his qualifications as an expert. The question what the condition of the joint of the pipe after the accident, as described by Gallagher, another witness, indicated as to the original construction of the joint, was a suitable question to be put to an expert who had heard so much of the testimony of Gallagher as was material to this question. *Cook* v. *Castner*, 9 Cush. 266. *Hunt* v. *Lowell Gas Light Co.* 8 Allen, 169. The answer of Jones was expressly based upon, and necessarily implies that he had heard, the statements of Gallagher, that he found a space where there was no lead, and that the lead was "soft," and had not been driven in as tightly as it might have been. The other question objected to was whether pipes, situated as this pipe was, could be affected by contraction or expansion, from the time it was laid to the following November, so as to cause the leak described. The witness answered that in his judgment it could not. This question was likewise competent under the circumstances.

The whole evidence on the general question whether there

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was negligence on the part of the defendant in the original construction of the joint of the water-pipe was conflicting, and was rightly submitted to the jury. *Exceptions overruled.*

M. Williams, Jr., for the defendant.

J. W. Keith, for the plaintiff.

SAMUEL T. FIELD *vs.* INHABITANTS OF HAWLEY.

Franklin. Sept. 17, 1878.—March 17, 1879. ENDICOTT & SOULE, JJ., absent.

If, on a writ of entry, the tenant disclaims, evidence that the demanded premises were sold and conveyed by a collector of taxes to the tenant for non-payment of taxes by the demandant, and the deed put on record; that no entry was ever made upon or possession taken of the premises by the collector, or by any one in behalf of the tenant, but that, after the sale, the premises continued to be occupied by persons holding of the demandant the same as before the sale; and that the tenant did not notify the demandant that he did not claim the premises until the disclaimer was filed, does not show such an interference with the demandant's possession of the premises as to amount to a disseisin.

WRIT OF ENTRY, dated February 15, 1878, to recover a parcel of land in Hawley. The tenant disclaimed; and the demandant filed a replication, alleging that the tenant, by one Hitchcock, in February 1877, sold the demanded premises, and took a deed of the same; that the deed with affidavits was put upon record in the registry of deeds soon after the sale; and that the deed was placed in the custody of the treasurer of the tenant town, where it still remains, all pursuant to the St. of 1862, *c.* 183.

The case was submitted to the Superior Court, and, after judgment for the demandant, to this court on appeal, on an agreed statement of facts, in substance as follows:

The demanded premises belong to the demandant, and were assessed to him for the year 1876. In February 1877, they were sold by Joseph A. Hitchcock, the collector of taxes for the town of Hawley, for the taxes of the year 1876, and were conveyed by Hitchcock to the town by a deed which failed to state the name of the newspaper in which the advertisement of sale was published, and the deed with affidavits was within thirty

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days of the sale recorded in the registry of deeds. Soon after the recording, Hitchcock placed the deed in the custody of the treasurer of the town, and it has remained there ever since. No entry was ever made upon the premises or possession taken by the collector, or by any one in behalf of the town, but they have since been in the occupation of persons holding of the demandant, the same as before the sale. The tenant in this action has never notified the demandant that it did not claim the premises so sold and conveyed, until the disclaimer was filed. At the annual town meeting in November 1877, there was an article in the warrant, "to see what action the town will take in reference to lands deeded to the town by Joseph A. Hitchcock, as collector," and the town voted to pass the article. On January 30, 1878, the demandant wrote a letter to the selectmen of the town, contending that the sale of the premises was illegal, and stating that he intended to contest it, and also proposing certain terms of settlement; the substance of the letter was communicated to the town at its annual meeting in March 1878. At this meeting, there was an article in the warrant as follows: "To see what action the town will take in reference to a suit commenced against the town of Hawley by Samuel T. Field." Thereupon it was voted to choose an agent to settle or carry on the suit as the case may require, and no intimation was made to the demandant that the town, by its agent, did not intend to contest the demandant's title, until made by the plea filed in the case. The demandant has always contended that the sale and conveyance were illegal and void, but the selectmen of the town contended that they were good, until they consulted counsel.

If, upon the above facts, the action could be maintained, judgment was to be entered for the demandant; otherwise, for the tenant.

J. A. Aiken, (*D. Aiken* with him,) for the tenant.

S. T. Field, pro se.

AMES, J. We do not find in the agreed facts anything that amounts to such an interference with the demandant's possession of the premises as to entitle him to consider himself disseised for the purpose of trying his right in a writ of entry.

In *Favour* v. *Sargent*, 6 Pick. 5, it was held to be no sufficient objection to a general disclaimer, that the tenant had taken a

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deed of the demanded premises from a collector of taxes, without also showing that he had had possession under that deed. In *Towle* v. *Ayer*, 8 N. H. 57, *Richardson*, C. J., says, in behalf of the court, that "it has never been held that mere words, or the taking of a deed of land without entry under it, can be considered as a disseisin. There must be some actual interference with the possession of land to constitute what may be considered by the owner as a disseisin at his election." In *McDaniels* v. *Reed*, 17 Vt. 674, which is cited by the demandant, there was no disclaimer by the tenant, and the case was tried on the general issue. See also *Allen* v. *Holton*, 20 Pick. 458; *Bates* v. *Norcross*, 14 Pick. 224; *Little* v. *Megquier*, 2 Greenl. 176; *Putnam Free School* v. *Fisher*, 38 Maine, 324.

Upon the disclaimer, as the demandant has not brought his case within the Gen. Sts. *c.* 134, § 6, the tenant is entitled to judgment for its costs. *Judgment accordingly.*

LUCIA M. HASTINGS *vs.* JAMES STETSON.

Hampshire. Sept. 17, 1877. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

A person who utters a slander is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby render themselves liable to the person slandered.

TORT, in five counts, for slander, in accusing the plaintiff of the crimes of adultery and fornication. Answer, a general denial.

At the trial in the Superior Court, before *Bacon*, J., the evidence tended to show that the words complained of in the first count of the declaration were spoken by the defendant to the brother of the plaintiff, in the presence of a number of persons, during an angry altercation between the brother and the defendant; that the words complained of in the second count were spoken by the defendant, to the father of the plaintiff, in a public place, in the hearing of a number of persons, during an angry altercation between the father and the defendant; and

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that the words complained of in the third count were spoken by the defendant, in another public place, in the hearing of a number of persons. The evidence was conflicting as to what was said by the defendant on the different occasions. There was evidence that the remarks made by the defendant on the first and second occasions were repeated by some of the persons who heard them, but there was no evidence that the remarks com plained of were repeated to the plaintiff, and how or when, if ever, she heard of what had been said; nor that the defendant asked or authorized in words any one to repeat the remarks he made.

The defendant asked the judge to rule that no damages were to be allowed to the plaintiff on account of statements made by others than the defendant, although such statements were repetitions of statements made by the defendant; that if the jury should find that the words spoken by the defendant were not said in the presence or hearing of the plaintiff, and only became known to her as they were repeated by others, then she could not recover damages for mental distress caused by the repetitions of the statements so made to her by others, whether made before or subsequent to the suit. The judge refused so to rule, but instructed the jury as follows: "The defendant is not responsible because somebody repeats the language which he used; for the injury done by the repetitions of his words by another he is not responsible, unless you are satisfied that he uttered the slanders under such circumstances as to authorize and to cause, as a proximate and necessary result of his utterance of the language, a repetition of the words. If it was a natural and necessary result, a natural and proximate result, of the language used by the defendant, that the words would be repeated by others, the injury done by the repetition would be a natural result of what the defendant did, would be the proximate result. If in substance he made the charge in such a way as to make himself the authority for it, and others repeated it, they would be liable to the plaintiff for the repetition, but the injury may have been, and it is for you to say whether it was in this case, the natural and proximate result of the original slander by the defendant; if so, the defendant is responsible, and if not, he is not responsible." And at the close of the charge, after discussion by

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counsel, the judge instructed the jury they were not to consider the repetitions unless they were the natural and proximate result of the slanders, and the slanders were uttered in such way by the defendant as to authorize the repetitions.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

H. H. Bond, for the defendant.

G. M. Stearns, for the plaintiff.

GRAY, C. J. It is too well settled, to be now questioned, that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person slandered; and that such repetition cannot be considered in law a necessary, natural or probable consequence of the original slander. *Ward* v. *Weeks*, 4 Moore & Payne, 796; *S. C.* 7 Bing. 211. *Tunnicliffe* v. *Moss*, 3 Car. & K. 83. *Barnett* v. *Allen*, 1 F. & F. 125. *Dixon* v. *Smith*, 5 H. & N. 450. *Parkins* v. *Scott*, 1 H. & C. 153. *Derry* v. *Handley*, 16 L. T. (N. S.) 268. *Stevens* v. *Hartwell*, 11 Met. 542, 550. *Terwilliger* v. *Wands*, 17 N. Y. 54.

In the present case, there was no evidence that the defendant, in any form of words, asked or authorized any one to repeat his statements, or that those who did repeat them held any relation to him that would imply such authority, or had any legal justification for the repetition. The presiding judge, though expressly requested to rule that no damages could be recovered by the plaintiff on account of the repetition by third persons of statements made by the defendant, declined so to do, and, in the instructions given, allowed the jury to hold the defendant responsible for repetitions by such persons, and for which they would themselves be liable to the plaintiff. For this reason the

Exceptions must be sustained.

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LUTHERA J. SNOW *vs.* WALLACE C. SHELDON.

Hampshire. Sept. 18, 1878. — March 24, 1879. ENDICOTT & SOULE, JJ., absent.

A married woman, who owns a farm and carries it on for the support of her family or her husband's family, is engaged in a "business on her separate account," within the St. of 1862, c. 198, § 1; and, if she fails to file the certificate required by that statute, her personal property used in such business is liable to attachment by the creditors of her husband; and it is immaterial that the produce of the farm is mainly used in the support of her family.

REPLEVIN of a hay-tedder, sled, wagon and mowing-machine. Writ dated April 9, 1877. The defendant, a deputy sheriff, justified under an attachment on January 23, 1877, on a writ in favor of J. A. Palmer, against the husband of the plaintiff.

At the trial in the Superior Court, before *Gardner*, J., it appeared in evidence that previously to October 2, 1872, the plaintiff with her husband and family lived together on a farm in Ware, containing about one hundred and sixty acres; that on that day the farm was conveyed by the husband to Benjamin Hutchinson, who on the same day conveyed it to the plaintiff; that the plaintiff, her husband and family continued to live on the farm after the conveyance, the same as before. The plaintiff testified that her husband worked on the farm and attended to the management of it, the same as he did before the conveyances, except that after the conveyances he acted as her agent, and that the farm was carried on as farms usually were in that locality; that a number of cows and other animals were kept on the farm; that it was necessary to employ help to assist the husband to do the planting, haying, and at times to do the harvesting; that butter was made from the milk of the cows, some of which was exchanged for articles used in the family of the plaintiff and her husband; that the crops raised on the farm were usually fed out to the stock on the farm, except such as were used in the family, although at times a portion of the produce was sold and the money given to the plaintiff; that the plaintiff furnished the pay for the help employed on the farm, and for such articles as were purchased to carry on the farm; that some of the articles replevied were purchased by the husband and afterwards paid for

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by the plaintiff, with money furnished the husband by the plaintiff; and that they were used in carrying on the farm.

It also appeared in evidence, that some of the articles described in the replevin writ were included among other articles in a bill of parcels made by the plaintiff's husband to Henry G. Hutchinson on July 15, 1872, which was recorded on October 8, 1872, and in a bill of parcels from Hutchinson to the plaintiff, dated April 12, 1873, which was recorded on October 6, 1873; that such articles were at the time of such bills of parcels upon the farm conveyed by the plaintiff's husband to Benjamin Hutchinson, and remained there and were used in carrying it on from that time to the time of the attachment. The plaintiff testified that she had been in possession of these articles since the date of the bill of parcels; and that no money was paid by her at any time for the property in the deed or bills of parcels.

It was not contended that the conveyance of the farm or the act with reference to the personal property was made in fraud of the creditor Palmer; and it was admitted that his debt accrued against the plaintiff's husband subsequently to the conveyance. It was also admitted that no certificate was filed by the plaintiff, in accordance with the St. of 1862, *c.* 198.

The defendant contended and asked the judge to rule that, no certificate having been filed by the plaintiff as required by the statute, the property replevied was liable to be attached on the writ in favor of Palmer for the debt of the plaintiff's husband. The judge refused so to rule; ruled that no certificate was necessary in order to prevent the attachment of the property on the writ of Palmer against the husband of the plaintiff; and directed a verdict for the plaintiff. The defendant alleged exceptions.

H. H. Bond, for the defendant.

C. Delano, for the plaintiff.

AMES, J. It appears from the bill of exceptions that the farm, containing about one hundred and sixty acres, was carried on under the management, and generally by the personal labor, of the plaintiff's husband. A number of cows and other animals was kept on the place. Additional laborers were employed to assist in the planting, haymaking and harvesting seasons. The management generally was such as is usual in farms in that

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part of the country. It does not appear that the husband had any other occupation, but in all that he did upon the place he was acting as the plaintiff's agent. The farm itself belonged to her, and she claims to be the owner of the animals kept on the place, of the produce of the farm, and of all the tools, implements, and personal property of every kind used in carrying it on. She furnished the pay for the help employed, and for all such articles as were purchased to be used upon the place. And whatever money was obtained from the sale of any of the produce was paid to her. She distinctly contends that the whole of the business was on her separate account.

The only question is whether this business comes within the meaning of the St. of 1862, *c.* 198, § 1, which requires that a married woman doing business on her separate account, in order to protect her property employed in such business from liability to be attached for her husband's debts, must file with the town clerk the certificate prescribed by that statute. The object of the statute was to afford the means of ascertaining in which of two persons, apparently in the possession and use of property in carrying on any kind of trade or occupation, the title is vested. So that all, having occasion to transact business with either, may regulate their dealings accordingly. Bigelow, C. J., in *Chapman* v. *Briggs*, 11 Allen, 546. It has been decided that this provision of the statute applies to personal property only. *Bancroft* v. *Curtis*, 108 Mass. 47. The certificate should set forth the name of the husband, the nature of the business proposed to be done, and the place where it is to be done, "giving the street and number of the place of business if practicable." We do not understand that this statute is to be restricted in its application to cases in which a married woman goes into business as a trader in the ordinary sense of the word, or manufactures goods for sale, or keeps a boarding-house, but that agriculture may be one of those occupations in which she may do business on her separate account within the meaning of the statute. If it is an occupation by which she supports herself and her family, and is carried on with her funds, and with implements and means belonging to her, it is immaterial that the produce is mainly consumed in her family, and that a small part of it only is raised to be sold.

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The case of *Proper* v. *Cobb*, 104 Mass. 589, which is cited by the plaintiff, does not conflict with our view of the case at bar. There may be partial uses of land belonging to a married woman on so small and trivial a scale as not to come within the description of a separate business within the meaning of the statute, and cases might be imagined presenting some ambiguity in regard to its application. We go no farther on this occasion than to say, that where a married woman carries on a farm for the support of her family, or her husband's family, she is following a separate business, which requires the designated certificate for the protection of the personal property employed in it from liability to the husband's debts. *Chapman* v. *Foster*, 6 Allen, 136. *Feran* v. *Rudolphsen*, 106 Mass. 471.

As the jury were instructed to find for the plaintiff, on the ground that no certificate was necessary to protect the property from attachment by a creditor of her husband, a new trial must be ordered. *Exceptions sustained.*

T. M. DEWEY, administrator, *vs.* ALICE F. DONOVAN & others.

Hampden. Sept. 25, 1878. — March 3, 1879. AMES & SOULE, JJ., absent.

A trust estate, which has been sold for non-payment of taxes, will not be ordered by this court, on a bill in equity under the Gen. Sts. *c.* 100, § 16, to be sold free from the tax title.

ENDICOTT, J. This is a bill in equity under the Gen. Sts. *c.* 100, § 16; and the first question to be determined is, whether this court has any power to decree a sale of the land before redemption from the tax sale.

The plaintiff's testator, Edward Donovan, by his will, which was admitted to probate in 1864, provided that, if his personal property was not sufficient to pay his debts, then from the rents and income of a house and land in Springfield the deficiency should be supplied. The will also provided that all the pecuniary legacies, seven in number, should be paid from the same source in the order of succession in which they were named; and, that this might be accomplished, the executor is authorized

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and directed to let the house and land, and, "after paying all necessary repairs, taxes, insurance and charges," and after providing for the debts, to apply the balance of the rents and income each year to the payment of the several legacies. Subject to these provisions, the testator devised the house and land to his brother, William Donovan.

The executor, Michael Needham, paid all the debts as provided in the will, and six of the legacies amounting to $1250, from the rents and income of the house, leaving at the time of his death, in July 1876, the last legacy of $600 unpaid. The plaintiff was appointed administrator with the will annexed in November 1876. The agreed statement sets forth that the house, which was valued at $5800, was then so out of repair that the plaintiff could not obtain sufficient income from it to pay the taxes then due, amounting to $434, and to make the necessary repairs. It is evident from this statement that Michael Needham failed to perform his duty as executor, as he did not make proper repairs, or provide for the taxes as required by the will.

The plaintiff did not pay the taxes, and the estate was sold for the taxes due upon it on March 12, 1877, to one Hitchcock, who conveyed it to Alice Donovan, the widow of William Donovan, to whom the estate was devised, subject to the charges named in the will. She has since remained in possession. It also appears that the heirs at law of William Donovan sold their interest in the estate to one Wood, and his interest was taken on execution and conveyed to Alice Donovan, who claims to be the absolute owner of the estate, subject to Wood's right of redemption. The plaintiff has made no tender to her of the amount of the taxes, although the two years in which he may do so have not expired. Gen. Sts. *c.* 12, § 36. Since the decease of the executor, an account of his executorship has been presented to the Probate Court, which has been allowed, whereby there appears to be due from the estate of the testator to the estate of Michael Needham the sum of $261 for services rendered and money paid out on account of the estate. It does not appear that the plaintiff resisted the allowance of this account or has appealed from the same, and it is difficult to see why any sum should be due for services of the executor, he having grossly neglected the duties imposed on him by the will.

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The prayer of the bill is, that the plaintiff may, by decree of the court, be allowed to sell and convey this estate free from the tax title now held by Alice Donovan, and from the proceeds pay to Alice Donovan the amount of taxes for which the estate was sold, with interest and costs, his own charges of administration, the amount due the estate of Michael Needham, and the last legacy of $600 remaining unpaid; and if any balance remains, to pay over the same to Alice Donovan or E. N. Wood, according as their respective interests therein may then appear.

The question has been argued before us whether this land, specifically devised to William Donovan subject to the charges named in the will, can be sold for the payment of those charges. But we do not propose to consider that question, as it is apparent that this bill seeks by a circuitous and irregular method, not authorized by law, to redeem an estate sold for taxes. Nor are we called upon to decide what would have been the rights of the plaintiff if the bill had been brought before the tax title had intervened.

The sale for non-payment of taxes was made on March 12, 1877. Under the provisions of the Gen. Sts. *c.* 12, § 36, the plaintiff, who is the owner of the estate within the meaning of the statute, has the right to redeem by paying or tendering the amounts due to the purchaser at any time within two years from the sale; or he may, under § 42, have relief in equity, if he brings his bill within five years from the sale. That is, he may have a bill to redeem, which is a cumulative or additional remedy. *Gladwin* v. *French*, 112 Mass. 186. *Simonds* v. *Towne*, 4 Gray, 608. *Rogers* v. *Rutter*, 11 Gray, 410. *Faxon* v. *Wallace*, 98 Mass. 44. By either method, the money must be paid to the purchaser. In *Mitchell* v. *Green*, 10 Met. 101, it was held, before the provision in § 42 was enacted, that this court had no jurisdiction in equity of a suit for the redemption of land sold for payment of taxes.

This is not a bill to redeem; it prays leave to sell the estate free from the tax-title, and to have the proceeds distributed in various directions (including the payment of all sums due to the purchaser) under the authority of this court. No question is made that the title acquired by the purchaser at the sale is in any way defective or incomplete, and the purchaser has the right

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to hold it, until the estate is redeemed in one of the methods pointed out by the statute. Assuming therefore that this court may have the power to order the sale of the real estate, if neces sary, it clearly has not the power to direct that it be sold free from the tax title, because that can be discharged only in the manner authorized by law; and we cannot engraft equitable exceptions on the statute and give to the plaintiff the power to sell, simply because, through negligence of the original executor in failing to pay the taxes and suffering the buildings to become out of repair, or through his own neglect or failure to obtain the money, he has been unable to pay the taxes. He must take such course as the law requires of him in the performance of the duties he has assumed under the will of the testator, and is not entitled to the relief he seeks by this bill.

Bill dismissed, with costs.

G. Wells, for the plaintiff.

A. M. Copeland, for the defendant.

LYDIA B. WARREN *vs.* WILLIAM DURFEE & another, administrators.

Bristol. Oct. 22, 1878. — March 8, 1879. ENDICOTT & LORD, JJ., absent.

In an action on a promissory note, signed by the defendant's intestate, and payable to the plaintiff "after death," it appeared that an engagement of marriage had existed between the plaintiff and the intestate; that the latter was subject to heart disease and when ill had frequently sent for the plaintiff to come and take care of him; that, on the night before the date of the note, the intestate had an unusually severe attack, and said that "if he got out of that he must have some writing done;" that the next day he made and signed the note, and handed it to the plaintiff in a sealed envelope, saying "there was something which would provide for her in case anything should happen to him, that if they were married, and he wanted it given up, he should expect her to give it up," to which she assented; and that, before and during their engagement, the plaintiff had taken care of his wardrobe, repaired his clothing and bought various articles for him, and taken care of him when he was ill. *Held*, that the note was intended by the intestate as a provision for the plaintiff by way of gift out of his estate, and no action could be maintained on it.

CONTRACT on the following instrument, declared on as a promissory note, signed by the defendants' intestate. James F.

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Westgate: "$15,000. Fall River, December 11, 1875. On demand after date I promise to pay to the order of Lydia B. Warren fifteen thousand dollars, value received, payable after death." Writ dated May 16, 1877.

Trial in this court, before *Colt*, J., who reported the case for the consideration of the full court, in substance as follows:

The plaintiff and Westgate were acquainted for many years before his death; and, in June 1874, they were engaged to be married. From that time until the death of Westgate, which occurred on February 8, 1876, they were tenderly attached to each other and were often together; and he occasionally went to her home in Rhode Island to visit her. In September 1875, he was taken ill at Fall River, where he lived, and sent for the plaintiff to come and take care of him, which she did. He got better and she went home just before Thanksgiving. Early in December he had another attack. He again sent for her, and she came and remained until after his death. He seemed to recover also from this attack. On the night before December 11, 1875, he had an unusually severe attack of heart disease. He said if he got out of that he must have some writing done. The next day he went to his place of business, where he made and signed, in the presence of a witness, the instrument declared on. That evening, at his house, he took out a sealed envelope and handed it to the plaintiff, saying to her, there was something which would provide for her in case anything should happen to him; that if they were married, and he wanted it given up, he should expect her to give it up. To this the plaintiff assented. He then said he did not want her to leave it around where a certain person could see it. She then took the sealed envelope and carried it to her room, where she kept it in her possession until after his death, when she took it with her when she returned to her home, and has had possession of it ever since. After Westgate's death, she opened the envelope, and found inside of it the instrument declared on. After the engagement in June 1874, Westgate was anxious to have the marriage take place in April 1875. She said she had suits pending about her husband's estate with his brothers, and wanted to wait until those were over, and the marriage was therefore deferred. Finally, in October 1875, Westgate said he could do better by her than the Warrens, and

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the marriage was fixed for his next birthday, February 16, 1876, and, a few days before his death, invitations were given to a few friends to be present. Before and during the engagement, the plaintiff took care of his wardrobe, repaired his clothing, bought his handkerchiefs and stockings, and attended to a good many other things for him, and at various times when he was ill took care of him. The defendants were appointed administrators of his estate on March 8, 1876, and on April 1, 1876, demand for the payment of this claim was made upon them, which was refused.

Upon these facts, the plaintiff contended that she could recover the full amount of the instrument declared on, with interest from the date of the demand. The defendants contended that the plaintiff could not recover; and that, if she could recover anything, she was only entitled to recover for the services actually rendered to Westgate.

If the plaintiff could recover the full amount claimed, judgment was to be entered for her for such amount; if not, and the plaintiff was entitled to recover for the services actually rendered, the case was to stand for trial upon that issue; otherwise, judgment for the defendants.

J. M. Morton, Jr., for the plaintiff.

G. Marston, (*J. C. Blaisdell* with him,) for the defendants.

SOULE, J. The plaintiff seeks to recover on the instrument declared on, as on a promissory note given in payment for services rendered and in consideration of the promise of a speedy marriage; and, failing that, to recover the value of the services rendered, which she contends entered into the consideration of the instrument. The defendants contend that the instrument is not a promissory note, because it was not delivered to take effect during the lifetime of the signer; and that it is invalid for want of consideration, and because it was intended as a testamentary disposition of property by the signer, and not as a contract in payment of a debt or obligation of any kind.

Unless the evidence is sufficient to warrant a jury in finding a valid consideration for the instrument, the action cannot be maintained. It is not enough to show that there was an obligation on the part of the signer to the plaintiff, which would have been a good consideration for a note given in sat-

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isfaction thereof; there must be evidence that the instrument was given and accepted in payment or satisfaction of such obligation.

We are of opinion, on the evidence in the case, that the circumstances under which the instrument was given, and the statement of the intestate at the time, point to an entirely different purpose from that of payment, either for services or for the promise of a speedy marriage. The intestate had been seriously ill with disease of the heart. While thus ill, he said that if he recovered he must have some writing done; and on the next day made the instrument and gave it to the plaintiff in a sealed envelope, requesting her not to open it till after his death, and saying that there was something which would provide for her in case anything should happen to him; that if they were married, and he wanted it given up, he should expect her to give it up, to which she assented. These circumstances, wholly inconsistent with the theory that the instrument was intended as a settlement of account, are conclusive evidence that the intestate was attempting to make a provision for the plaintiff out of his estate, in case he should die without marrying her. If anything were needed to make this inference from the facts more absolutely inevitable, it is found in the instrument itself, which is, in terms, payable after the maker's death. Being without consideration, therefore, the note is void. It is not valid either as a gift *causa mortis*, or as a testamentary disposition of property. *Parish* v. *Stone*, 14 Pick. 198. *Hulse* v. *Hulse*, 17 C. B. 711.

The facts in the case at bar are essentially different from those in *Dean* v. *Carruth*, 108 Mass. 242, where the refusal of the judge to rule that the action could not be maintained was sustained by this court. In that case, the note was contained in a sealed envelope, on which was written a request to the payee not to open it till after the maker's death, and on the same paper with the note was written a request to the payee to accept the note from her true friend, the maker. There was evidence of services rendered by the payee, similar to those proved in the case at bar, but there was no marriage engagement between the parties; and there was no affirmative statement by the maker of the note that the envelope contained something which would provide for the payee in case of the maker's death; nor any

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evidence of an agreement by the payee to give up the note at request of the maker, on any contingency. The evidence left the question of purpose in giving the note, and of consideration, open as a matter of inference from the evidence, the court holding that the request to accept the note was not, as matter of law, conclusive that it was a gift, as it was consistent with a desire to have the note accepted instead of money, and that the request that the envelope should not be opened till the maker's decease was not decisive on the question of consideration, and that the two memoranda, construed together, did not, as a matter of legal interpretation, signify that the note was a mere gift.

In the case at bar, the declaration of the intestate the day before the note was made, while ill, and doubtful of recovering his health, added to his statement when the envelope was delivered, that there was something which would provide for her if anything should happen to him, — which is equivalent to "if he should die," — give a decisive character to the transaction, which precludes the idea of the note being intended otherwise than as a provision for the plaintiff by way of gift, out of the estate of the maker. In *Worth* v. *Case*, 42 N. Y. 362, relied on by the plaintiff, the note purported on its face to be given "in consideration of services rendered," and there was evidence that the plaintiff had rendered services which had not been otherwise paid for; the evidence of consideration was therefore distinct.

Judgment for the defendants

CHARLES ALMY *vs.* GEORGE F. WINSLOW.

Bristol. Oct. 23, 1878. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

The following instrument, signed in the presence of an attesting witness, "On demand with interest please pay J. S. or order fifty-five dollars," is a witnessed promissory note, within the statute of limitations, Gen. Sts. c. 155, § 4.

CONTRACT on the following instrument, declared on as a promissory note: "New Bedford, April 26, 1870. On demand

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with interest for value received please pay Charles Almy or order fifty-five and 33-100 dollars. George F. Winslow.

"Witness, Asa C. Smith."

Writ dated March 28, 1877, and returnable to the Superior Court. The defendant demurred, on the ground that the declaration set forth no legal cause of action. The court overruled the demurrer; and the defendant alleged exceptions.

The defendant then filed an answer, admitting the execution of the paper declared on, and that the same was for a valid consideration; and alleging that the cause of action did not accrue within six years. At the trial, before *Gardner*, J., without a jury, the judge ruled that the instrument declared on was a witnessed promissory note, and was not barred by the statute of limitations; and ordered judgment for the plaintiff. The defendant alleged exceptions.

C. W. Clifford, for the defendant.

C. Almy, Jr., for the plaintiff.

SOULE, J. The only question in this case is, whether the instrument sued on is or is not a witnessed promissory note. That it is witnessed is admitted. The controversy is as to the legal effect to be given to its terms. It does not purport to be a mere acknowledgment of the existence of a debt, and is admitted to have been given for a valuable consideration. It is in the form of a draft or bill of exchange, except that it is not addressed to or drawn upon any one, and therefore lacks one essential characteristic of a bill. It is not in the ordinary form of a promissory note, for it is not in express terms a promise, but a request to pay. It is familiar law, however, that no particular form of words is necessary to constitute a promissory note. There need not be a promise in express terms, it being sufficient if an undertaking to pay is implied in the contents of the instrument. *Daggett* v. *Daggett*, 124 Mass. 149. *Franklin* v. *March*, 6 N. H. 364. *Carver* v. *Hayes*, 47 Maine, 257. *Russell* v. *Whipple*, 2 Cowen, 536. *Brooks* v. *Elkins*, 2 M. & W. 74.

The instrument sued on was intended by the parties to take effect as a contract. The language imports this; and no other inference can be drawn from the fact that it was given for value. It cannot operate as a draft, check, or bill of exchange, because there is no drawee. One who signed an acceptance on it would

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not be liable as acceptor of a bill. *Peto* v. *Reynolds*, 9 Exch. 410. To be operative at all, as a contract, it must be as a promissory note. It was said in *Edis* v. *Bury*, 6 B. & C. 433, by Lord Tenterden, that, "where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it either as a promissory note or a bill of exchange." In that case, the instrument was in the form of a promissory note, but had been accepted by a person whose name had been written on the corner of the paper at which the name of the drawee of a bill is usually placed; the maker, being sued, contended that he was discharged for want of notice of dishonor as drawer of a bill. The court decided otherwise. To the same effect is the decision in *Lloyd* v. *Oliver*, 18 Q. B. 471. It has been repeatedly held, that, where the drawer and drawee of an instrument in the form of a bill of exchange are the same person, it may be declared on as a promissory note. *Miller* v. *Thomson*, 3 Man. & Gr. 576. *Allen* v. *Sea Assur. Co.*, 9 C. B. 574. *Fairchild* v. *Ogdensburgh, &c. Railroad*, 15 N. Y. 337. The reason is obvious. The drawer of a bill on another assumes only a conditional liability; his contract is that he will pay if duly notified of dishonor of the draft; but when the drawer is the drawee too, such notice would be an empty form, and his undertaking is not conditional, but absolute. The doctrine of the cases cited above on this point is recognized and approved in *Commonwealth* v. *Butterick*, 100 Mass. 12.

In view of the foregoing authorities, there seems to be no injustice in holding that an instrument in the form of that sued on is to be regarded, in passing upon the rights of the signer and the payee, as a promissory note. The signer, having made the instrument in the form of a bill of exchange, but without addressing it to any one as drawee, may properly be held to have intended to assume the absolute liability to pay, which he would have assumed if he had addressed the instrument to himself. Any other view makes the instrument valueless. It does not contain anything which informs the payee what is to be done in order to fix the liability of the signer. If the undertaking of the signer is not absolute, it is nothing.

In the case of *Ball* v. *Allen*, 15 Mass. 433, the opinion of *Parker*, C. J., contains some expressions apparently inconsistent

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with the views here stated. The decision in that case, however, went upon the failure to prove that the instrument declared on was ever delivered by the defendant, or that there was any consideration for it, and the expressions referred to were wholly unnecessary.

In the later case of *Ellis* v. *Wheeler*, 3 Pick. 18, the action was on an instrument in terms a check, as follows: "Memdm. State Bank. No. 100 Dolls. cts. May 29, 1819. Pay to Capt. Cazneau or bearer one hundred dollars. Elisha Wheeler. To the cashier." The word State was cancelled. The instrument was therefore in the form of a check not addressed to any person or corporation. The plaintiff came into possession of it five years after it was made. The declaration contained money counts, and counts on the instrument as a promissory note and as a bill of exchange. The court, without expressing an opinion on the special counts, sustained the action on the count for money had and received. This can be upheld only on the ground that the instrument was negotiable and imported an absolute undertaking by the signer, and was in effect, though not in apparent form, a promissory note.

We are of opinion that the instrument sued on was in legal effect a promissory note, and that, being duly attested, action on it was not barred by the statute of limitations.

Exceptions overruled.

MACHINISTS' NATIONAL BANK *vs.* WILLIAM N. FIELD & others.

Bristol. Oct. 28, 1878. — March 8, 1879. ENDICOTT & LORD, JJ., absent.

A certificate of shares in the capital stock of a corporation was taken without the owner's knowledge, and, together with a forged power of attorney, delivered to a broker for sale. The broker employed an auctioneer, who sold the stock to a purchaser. The broker then sent the stolen certificate with the forged power of attorney to the corporation, requesting a new certificate in the name of the auctioneer. The corporation complied with the request, and the new certificate was sent to the auctioneer, who delivered it to the broker with a power of attorney, who in turn delivered it to the purchaser, to whom the corporation afterwards issued a new certificate. The broker, the auctioneer, the purchaser and the corporation acted in good faith, and supposed the forged power of attorney to be genuine. The original owner then brought a bill in equity against the

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corporation, and obtained a decree ordering it to procure and transfer to the plaintiff the shares of stock, and to make and deliver a certificate of the same. The corporation thereupon issued a certificate for the shares in question, and thereby increased its capital stock. It then brought a bill in equity against the broker, the auctioneer and the purchaser, setting forth the above facts. *Held*, that the bill could not be maintained.

BILL IN EQUITY against William N. Field, a broker, Joseph P. Hawes and Francis Henshaw, auctioneers under the firm of Hawes & Henshaw, and Theodore Dean. Hearing before *Ames*, J., who reported the case upon the pleadings and the following facts, for the entry of such decree as, in the opinion of the full court, the case might require:

Elizabeth W. Pratt was the owner of twelve shares of the capital stock of the plaintiff bank, for which she held a certificate, dated October 15, 1875, and this certificate was taken from her house without her knowledge by Charles C. Pratt, and, with a forged power of attorney, delivered to the defendant Field, who employed Hawes & Henshaw to sell the twelve shares by auction; and they sold the same, on March 8, 1876, to Dean, for $1920. On March 10, 1876, Field called on Hawes & Henshaw, for the proceeds of the sale, and they informed him that, in accordance with their practice, they would pay over the same on receiving from the bank a certificate of the shares; and thereupon Field, believing the power of attorney to be genuine, sent the certificate, with the forged power of attorney, to the bank, with a letter, requesting a transfer of the shares to Hawes & Henshaw. The president of the bank, believing the power of attorney to be executed by Elizabeth W. Pratt, inserted his own name therein as attorney, and transferred the twelve shares to Hawes & Henshaw, and issued a certificate therefor to them, and sent this certificate to Field, who delivered it to Hawes & Henshaw, and they paid him the proceeds of the sale less $1.50, their commissions for selling. Hawes & Henshaw delivered this certificate to Dean with a power of attorney to transfer the same, and Dean paid them therefor $1920. Dean, who was then the holder of a certificate for forty-three shares of said stock, executed an assignment of the twelve shares to himself; and, upon the surrender of the respective certificates for forty-three shares and twelve shares, the bank issued to him a certificate for fifty-five shares, which he now holds. The bank paid to Dean the divi-

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dend declared in April 1876. Field, on March 13, 1876, paid to Charles C. Pratt the amount received by him from Hawes & Henshaw, less $1.50, his commission as broker on the sale.

Neither Hawes & Henshaw nor Dean ever saw the certificate of the shares in the name of said Elizabeth W. Pratt, nor the power of attorney under which the same were transferred, or ever knew or heard that she was the owner of the same, or who was the owner of the same till after the issue by the bank of the certificate to Hawes & Henshaw, and until after the transfer and issue of the certificate to Dean.

Field acted in good faith in the sale of the shares, and there was no evidence that he had any knowledge or suspicion of the forgery of the power of attorney, and he never made any representation to the bank or its president, or had any communication with either, except the letter above referred to.

Elizabeth W. Pratt, in June 1876, filed a bill in this court against the bank, praying that said twelve shares might be reissued to her, and obtained a decree ordering the bank to "procure and transfer to the plaintiff her twelve shares of the capital stock of the defendant corporation, as described in the bill, and make and deliver to the plaintiff a proper and legal certificate for the same, and make a proper and legal record upon the books of said corporation of said transfer and certificate;" and also to pay to the plaintiff the dividends declared upon the twelve shares. See 123 Mass. 110. The bank reissued to Elizabeth W. Pratt a certificate for her twelve shares, and there are now outstanding, issued by the bank, certificates for twelve shares more than the authorized capital.

The present bill concluded thus: "Wherefore, inasmuch as there are now two different parties, claiming distinct rights or interests in the same stock, which cannot be justly and definitely decided in an action at law, and whereas there is no plain, adequate and complete remedy at the common law, but the same is properly cognizable only in a court of equity, the said bank brings this bill in equity, and prays for a decree that said Field and said Hawes & Henshaw may be ordered to repay to said bank the amount so received from said Dean for said twelve shares of stock, that said bank may return the same to said Dean, or to repay the same to said Dean directly; and that he may be ordered

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to surrender to said bank his said certificate of fifty-five shares, and retake his former certificate of said forty-three shares before owned by him, and all parties restored to their former position; or that such other orders and decrees may be made as law and justice may require, or as to your honors may seem meet;" with a prayer for process.

E. H. Bennett & H. J. Fuller, for the plaintiff.

Jabez S. Holmes, for Field.

A. S. Wheeler, for the other defendants.

GRAY, C. J. This bill cannot be maintained. The sole ground on which it invokes jurisdiction in equity is that "there are now two different parties claiming distinct rights or interests in the same stock, which cannot be justly and definitely decided in an action at law;" and the relief specifically prayed for is that Dean may surrender to the plaintiff bank the certificate of the new shares issued by it to him, and that Field and Hawes & Henshaw may be ordered either to repay to the plaintiff the money received by Hawes & Henshaw from Dean for these shares, so that the plaintiff may return that money to Dean, or else to repay the money to Dean directly.

Dean cannot be ordered to return his certificate, because he purchased the shares in good faith and for valuable consideration, and the certificate issued to him is as against the bank conclusive evidence of his title. The bank has no right to compel him rather than any other stockholder to give up his certificate and thereby assume the responsibility of its own illegal act in issuing a greater number of shares than the law authorized. *Salisbury Mills* v. *Townsend*, 109 Mass. 115, 122. *Pratt* v. *Machinists' Bank*, 123 Mass. 110, 112. *Lowry* v. *Commercial & Farmers' Bank*, Taney, 310, 328. *In re Bahia & San Francisco Railway*, L. R. 3 Q. B. 584. *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616. The relief specifically prayed for against Field and against Hawes & Henshaw is for Dean's benefit, and contingent upon his being ordered to surrender his certificate, and, as he is not bound to do so, he has no claim to be repaid any money by either of the other defendants.

The general relief prayed for must be confined to the ground of jurisdiction stated in the bill; and it is quite clear that there are not two parties before the court, claiming distinct rights or

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interests in the same stock. Mrs. Pratt is not a party, but has obtained her rights in her former suit against the bank. The only party claiming the shares in question is Dean, whose title, as we have seen, this plaintiff cannot controvert. Hawes & Henshaw claim no title in the stock, and are protected, equally with Dean, by the certificates issued to them by the plaintiff. Field also has and claims no title in the stock, and if, by reason of his having presented to the bank the forged power of attorney upon which the new certificates were issued, he is liable to the bank in any form, (of which we give no opinion,) the bank has an adequate remedy against him alone by action at law.

Bill dismissed, with costs.

TIMOTHY GORDON *vs.* CITY OF TAUNTON.

Bristol. / Oct. 25, 1878. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

In an action of tort against a city for breaking and entering the plaintiff's close in 1877, and removing a fence therefrom, the plaintiff claimed title by adverse possession, and put in evidence that he enclosed the land with a fence in 1855, and maintained the fence until the trespass complained of. The defendant's evidence tended to show that, for a period of more than twenty years, down to 1855, the land was unenclosed, openly used by the public and reputed to be a part of the common; and that in 1869 the superintendent of streets removed the fence. The defendant requested the judge to rule that the fact that the land was left open and unenclosed, and was used by the public for a period of twenty years, was sufficient to create an easement in it, either for the public or for the city, and, so long as such easement existed, the defendant would have the right to remove any obstruction to it. *Held*, that this instruction should have been given.

TORT for breaking and entering the plaintiff's close in August 1877, and removing a fence therefrom. At the trial in the Superior Court, before *Bacon*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the material parts of which appear in the opinion.

W. H. Fox & S. M. Thomas, for the defendant.

T. M. Stetson & G. E. Williams, for the plaintiff.

COLT, J. The superintendent of streets, acting under the order of the city council of Taunton, in August 1877 removed

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a fence which had been erected by the plaintiff in 1855 for the purpose of enclosing the premises in dispute. This is the trespass complained of.

The plaintiff, through mesne conveyances, claimed title under a deed from James L. Hodges, dated in 1836, bounding the land, on the northerly and westerly sides, by the road leading into Deane Street, so called. Hodges derived his title from Job W. Hall, in 1818, by whom the land was bounded, on the same side, partly on the common, near the meeting-house, and partly on the highway and other land. The road leading into Deane Street, and called Spring Street, was laid out in 1830, over the old common, and, as the defendant contended, separated a part of the common from the rest, on the side of land owned by the plaintiff's grantors. The extent and true limit of the common on that side was in dispute at the trial; and many aged witnesses testified that the land enclosed by the plaintiff's fence was, from their earliest recollection, unenclosed land, openly used by the public, and reputed to be a part of the common, down to the time when the fence was built in 1855. The title by deed was thus in dispute. But the plaintiff also rested his claim on a title acquired by adverse possession.

The defendant, on the other hand, contended that the land was not included by the description in Hall's deed in 1818, and had not been acquired by the disseisin of the plaintiff, because his possession had not been uninterrupted.

It was in evidence, that the proprietary records of Taunton contained no grant or allotment of this land to the defendant, and it does not appear that the town or the city ever acquired title, by express grant, from the original proprietors. Whether, by dedication, or presumption of grant, the city has now the legal title to the common; whether that title is an absolute title, with full power of disposition, or is held in trust to preserve the land for the use and benefit of the public; or whether the title still remains in the proprietary; it is not now necessary to determine, because there was evidence which would justify a finding that either the public, or the city, had acquired a public easement in the land, by adverse use and enjoyment, before the time when the plaintiff first took possession by erecting his fence in 1855. If the jury were satisfied that the land in dispute was

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within the limits of the common, then the erection of the fence created a nuisance, which the superintendent of streets, with or without the order of the city government, had a right to remove at any time before the plaintiff had acquired his alleged title by disseisin. *Valentine* v. *Boston*, 22 Pick. 75. *Wrentham* v. *Norfolk*, 114 Mass. 555. *Green* v. *Putnam*, 8 Cush. 21. *Arundel* v. *M'Cullough*, 10 Mass. 70.

In this aspect of the case, the defendant asked the judge to instruct the jury, that the fact that the land was left open and unenclosed, and was used by the public, for a period of twenty years, was sufficient to create an easement in it, either for the public, or for the city, and, so long as such easement existed, the defendant would have a right to remove any obstruction to it. This request contained a proposition which, as the case stood, should have been distinctly presented to the jury. The defendant's case depended on establishing by prescription the existence of the public common, and the fact that this land was part of it, at the time when the alleged encroachment by the plaintiff was made; but the judge refused to give the instruction requested, or its equivalent. It is indeed stated in the last part of the bill of exceptions, that full instructions were given, and not excepted to, as to what would constitute adverse possession; but it is apparent that this statement, from its relation to the instructions immediately preceding, and from the technical form in which it is put, has reference to the plaintiff's claim of title by adverse possession to the land, and not to the law governing the acquisition of a public easement by adverse use and enjoyment.

The city in good faith claimed title to the fee in the land, or at least title to a public easement in it. In 1865, a committee was appointed to prepare and report a schedule of all its real property, with a valuation of the same; and it was testified that the committee entered upon and appraised the land in dispute, as property of the city. In February 1868, another committee was appointed to ascertain what land, near Church Green, belonging to the city, was then occupied by private parties, and there was evidence that this committee entered upon and surveyed this land and included it in their report as belonging to the city. In November of the same year, an order was passed directing the superintendent of streets to widen Spring Street, by taking land

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of the city, under which, in 1869, he removed the plaintiff's fence, leaving the place open to the public.

It was the duty of the city government in support of the claim of title, by properly appointed agents, to remove obstructions to the use of the public common. And if in so doing, and while acting in good faith, a trespass was committed, the city in its corporate capacity is liable.

In *Thayer* v. *Boston*, 19 Pick. 511, 515, which was an action against the city for obstructing Dock Square by certain acts of officers having charge of the streets, Chief Justice Shaw said: "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known, at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done." It was accordingly held in that case, that the city was liable in an action on the case, where acts are done by its authority, which would warrant a like action against an individual. See also *Anthony* v. *Adams*, 1 Met. 284, 287; *Hawks* v. *Charlemont*, 107 Mass. 414; *Hill* v. *Boston*, 122 Mass. 344, 358, 359.

It was the right of the city, under the circumstances stated, to remove the obstruction, and the instruction asked ought to have been given. It is not necessary to consider other questions, which may be presented in a different form at a new trial.

Exceptions sustained.

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CHARLES J. HOLMES & others *vs.* FIRST NATIONAL BANK OF FALL RIVER.

Bristol. Oct. 25, 1878. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

A., in good faith, borrowed money of a bank, giving his memorandum check on a third person as evidence of the amount of the loan, and delivered a certificate of stock in a corporation, with a transfer on the back and a power of attorney, signed in blank, as collateral security for the loan. The bank then supposed A. to be solvent. Four days after, when the loan became due, A. paid the interest in cash, and offered, in payment of the principal, a check on a third person. The cashier of the bank, supposing that the check was drawn against funds, delivered to him the certificate of stock in the same condition in which it was received, and also delivered to him the memorandum check marked as paid. A. had at this time no funds with the person on whom the check was drawn, and had no reasonable expectations of having any to meet the check, and was in fact insolvent. Later in the day, A. redelivered the certificate of stock, but not the memorandum check, to the bank. *Held*, that the transaction did not amount to a payment of the loan; and that the bank was entitled to retain the certificate of stock as security for the loan, against the trustees of the estate of A. in bankruptcy.

BILL IN EQUITY by the trustees in bankruptcy of the estate of Alexander D. Easton and James T. Milne, formerly doing business under the style of Easton & Milne, to compel the conveyance to them of certain shares of stock in two corporations, alleged to have been conveyed by Easton & Milne to the defendant, in fraud of the bankrupt act. Hearing before *Ames*, J., who ordered a decree to be entered dismissing the bill, and reported the case, for the entry of such decree by the full court as law and justice might require, upon the following facts:

On January 1, 1876, Easton & Milne procured of the defendant a loan of $10,000, and gave the defendant therefor their memorandum check on Richardson, Hill & Company, bankers, of Boston, for that amount, merely as evidence of the amount of the loan, and at the same time pledged to the defendant, as collateral security for the loan, the shares of stock in question. The loan was on demand, with the agreement that it should be paid on January 5, and was made in good faith by the parties thereto, the defendant supposing Easton & Milne to be perfectly solvent. The shares of stock were pledged by delivering the certificates representing the same to the defendant, and by

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Easton & Milne signing a transfer on the back of each certificate, in the following form: "For value received, we hereby sell, transfer and assign to ——— the shares within named, and authorize ——— to make the necessary transfer on the books of the company." The blanks in these transfers were not filled up at the time of depositing the certificates as collateral security, and no transfer was then made on the books of the corporations. Upon the face of the certificates was the following provision: "which shares are transferable only on the books of the company on the surrender of this certificate."

At about ten o'clock in the forenoon of January 5, Easton & Milne sent their clerk to the defendant bank, who paid in cash the interest due on the loan, and offered in payment of the principal Easton & Milne's check on Richardson, Hill & Company, for $10,000. The defendant's cashier, supposing this to be good and drawn against funds, took it, and, after stamping the memorandum check as paid, gave it with the shares and stock to the clerk, who took them away in the same condition in which they were when delivered to the defendant. The check, so received by the defendant, was sent forward by the afternoon mail of that day, in the usual course, to its correspondent in Boston, the National Bank of Redemption, for collection.

At about two o'clock on the same day, the treasurer of the Slade Mills, which had a large deposit at Easton & Milne's, drew, at the suggestion of Milne, two checks, as treasurer, upon Easton & Milne, for $10,000 each, and received therefor from Easton & Milne their checks for the same amounts on Richardson, Hill & Company, and took also, at Milne's suggestion, one of Richardson, Hill & Company's checks to the defendant bank, and exchanged it for a cashier's check of the defendant bank on the National Bank of Redemption, Boston, and took the other one to the Fall River National Bank, exchanging it in the same way for a cashier's check of that bank, also on the National Bank of Redemption. Both banks had funds at the National Bank of Redemption, and the cashier of each bank supposed the checks of Easton & Milne to be good. The check so received by the defendant was also sent forward in the afternoon of that day to its correspondent in Boston for collection. Milne ad-

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mitted that, when these checks were drawn, they had not the funds to meet them with Richardson, Hill & Company.

Prior to this transaction, but on the same day, Easton & Milne came to the conclusion that they could not go on without help, and, after the transaction above described, they issued notices to the various banks in Fall River, proposing to them a meeting in the evening of January 5. On receiving this notice, the defendant's cashier, at about five o'clock in the afternoon, for the first time learned that the checks on Richardson, Hill & Company would not be paid on presentation; and, upon the cashier's inquiring of Milne, whether he considered it right to give such a check and take back the securities which had been given upon the loan, Milne agreed to return the securities to the defendant, and did return them in the same envelope, and in the same condition as when taken up by him. The memorandum check was not returned, and nothing was given in place of it.

In the evening of January 5, there was a meeting of the bank officers and Easton & Milne, at which the defendant and five other banks in Fall River were represented. It was stated that Easton & Milne required the sum of $100,000 to tide them over their embarrassment, of which $60,000 would be needed to meet checks on Richardson, Hill & Company, (including the two received by the defendant, and the one received by the Fall River National Bank,) which would be presented the next morning for payment. A long discussion ensued, and it was voted that it was expedient to sustain Easton & Milne in the interest of the credit of Fall River, but there was much discussion as to the manner in which it was to be done. It was finally agreed that the banks should furnish $60,000 to meet the checks payable the next day, and in order to help Easton & Milne along; that the defendant on its part, and as its contribution to this purpose, should provide for the payment of its two checks of $10,000 each, the Fall River National Bank for its check of $10,000, and another bank for checks of Easton & Milne to the amount of $2500; that this and other banks, which had no checks of Easton & Milne, should make up the remainder of the $60,000, and that all the banks should honor and pay such of Easton & Milne's checks as might be presented at their counters

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the next day. At this meeting the defendant's president stated that his bank held the securities which are the subject of this suit, and nothing further was said in reference to them. It was also agreed that an investigation should be had into the affairs of Easton & Milne, to determine whether the $100,000, which they requested, should be furnished them to enable them to go on, and that in case it was finally decided to let them have that amount, then what the several banks did in taking care of the $60,000 of checks, and the checks paid by them on January 6, should be taken into account in the apportionment of the $100,000 between them. Several meetings of the banks were afterwards held with a view to arranging some plan to help Easton & Milne through their difficulties; trustees were chosen, and arrangements partially completed, and some banks placed some funds in their hands; but the whole matter was finally abandoned on January 8, and funds so placed were returned; and Easton & Milne thereupon closed their doors, and on January 17, upon their own petition, were adjudicated bankrupts, and the plaintiffs were subsequently chosen trustees to wind up their estate under the supervision of a committee of the creditors.

Immediately after the arrangement above made, the defendant drew its check on its Boston correspondent for the amount of the checks and $6000, which it advanced on the account of one of the other banks, supposing it was to be repaid by that bank. Some discussion took place as to how the funds should be sent to Boston, and it was finally agreed that the checks representing them should be made payable to the order of Easton & Milne, and that they should send the same by a special messenger to Boston on the first train in the morning, to meet the checks that would be presented at Richardson, Hill & Company's. This was done, and the checks received by the defendant from Easton & Milne were taken up in that way. Neither of the checks was returned to the defendant, but the defendant stated in reply to a question from the court that it made no claim under the checks.

The firm of Easton & Milne was in fact insolvent on the morning of January 5, although Milne testified that in giving the check to the defendant in the forenoon he acted in good faith; one of the defendant's witnesses, however, testified that

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Milne admitted to him, during the evening of January 5, that he had his misgivings about the matter at the time he gave the check. There was evidence that in the forenoon of January 5 the credit of Easton & Milne was good. Milne also testified that, after giving the $10,000 check to defendant in the forenoon, there was a change in the affairs of the firm; that they had a large call for funds from their depositors, amounting to between $25,000 and $30,000; but it appeared that part of this sum was the two checks amounting to $20,000 drawn by the treasurer of the Slade Mills at his, Milne's, suggestion, and that the call was not the result of any new obligations contracted by the firm.

It did not appear that Easton & Milne had any general authority to overdraw their account with Richardson, Hill & Company, although such overdrafts had occasionally been allowed by special permission, or when paper or valuable securities were in the hands of the drawees to be disposed of. There had been some instances in which such overdrafts had been acquiesced in without previous permission. The account of Easton & Milne was overdrawn at the time of all the transactions above described. Neither Easton & Milne, nor their trustees, have ever paid or offered to pay the amount lent except as above; and the same never was paid unless the above was a payment.

The shares of stock were transferred upon the books of the several companies to the defendant on the day following the redelivery of the certificates to the defendant's cashier, and were sold some time in the fall of 1876 by the defendant for nonpayment of the loan, bringing less than the amount of the loan, and are now held by the defendant.

The plaintiffs contended that the transaction in regard to the sending the money to Boston amounted to a new loan by the defendant to Easton & Milne; that the loan, which the shares of stock in question were pledged to secure, had been paid by the check received by the defendant from Easton & Milne; that the delivery of the shares of stock to Milne in the forenoon of January 5 was a surrender and termination of the pledge; and that the shares of stock were not legally repledged.

The judge found as a matter of fact, upon the evidence thus

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reported, and upon the transaction above described, that the original loan of $10,000 from the defendant to Easton & Milne, upon which the collateral security above described was given, had never been paid; the check upon Richardson, Hill & Company, which was offered in payment therefor, having been drawn with no funds and no reasonable expectation of funds in the hands of the drawees to meet it, and with no reasonable expectation that it would be honored by the drawees.

G. Marston & M. Reed, for the plaintiffs.

J. M. Morton, Jr., for the defendant.

COLT, J. There is nothing in the report of this case which leads us to doubt that the decree ordered by the single justice of this court, at the hearing before him, was right.

The bank acquired the shares of stock in question by a title valid against proceedings in bankruptcy. They were received as security, at the time the debt was contracted, January 1, and did not constitute a preference. The check of Easton & Milne, drawn on their Boston bankers, and given to the bank in the forenoon of January 5, upon the surrender of the stock certificates, was not a payment of the debt, because it was drawn with no funds, and no reasonable expectation of funds, in the hands of the drawees, to meet it, and no reasonable expectation that it would be honored. *Taylor* v. *Wilson*, 11 Met. 44, 51. The delivery of the securities did not terminate the pledge, or transfer the title of the bank, because they were obtained wrongfully; the act of returning them was not a new pledge, but simply restoring the bank to its rights. *Way* v. *Davidson*, 12 Gray, 465.

The principal question is, whether the transactions between the parties in the after part of the same day (January 5), amounted to a payment of the debt for which the securities were pledged. This is a question of fact upon the evidence reported, upon which the finding of the single judge will not be reversed, unless it appear to be clearly erroneous. *Reed* v. *Reed*, 114 Mass. 372. *Montgomery* v. *Pickering*, 116 Mass. 227.

It appears that, upon the discovery of the fact that Easton & Milne were in failing circumstances, it was proposed that the several banks in the city should raise a sum of money

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to be apportioned among them, sufficient to carry the firm through its difficulties. Pending the completion of this arrangement, the defendant bank, with its own funds, took up the checks, which it had received of the firm, drawn on its Boston bankers; and was left in the condition in which it was before it received the check of the firm, and gave up the securities. No part of the money to pay these checks was furnished by the firm. If the plan had been carried out, then the amount apportioned would have been a new loan; but it was abandoned, and the defendant's right to its securities remained as before. It cannot make any difference, that the checks were taken up in the name of the firm, and that the bank received nothing in place of the checks. The real nature of the transaction is to be considered. The president of the bank had stated to all parties interested, when the plan for relief was under consideration, that the defendant held these securities, and there is no evidence of an understanding that they were to be given up. They were securities for the loan; and the loss of the memorandum check, or its delivery to the firm without payment, would not discharge the claim of the bank upon them. The evidence of payment, afforded by the course pursued and the forms adopted, is controlled by the undisputed circumstances and the real intention of the parties. The defendant is entitled to the benefit of the presumption, that it could not have intended to give up its securities until its debt was actually paid. *Butts* v. *Dean*, 2 Met. 76. *Curtis* v. *Hubbard*, 9 Met. 322, 328. And, upon the whole, the clear preponderance of the evidence is in favor of the validity of the defendant's title.

Bill dismissed, with costs.

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RODNEY FRENCH *vs.* LAURISTON FRENCH.

Bristol. January 1. — March 4, 1879. COLT & ENDICOTT, JJ., absent.

A., who had levied an execution on the property of a mining company in Colorado, and had bought the property when sold under the levy, and B., a creditor of the company, entered into an agreement in this Commonwealth, by the terms of which it was agreed that there was due A. a certain sum and interest, that A. should manage the property, and convey it to B. whenever he realized the amount of his demand "and interest as aforesaid," either from the property or from B. in liquidation of his "aforesaid demand." *Held*, on a bill in equity by B. against A., for the conveyance of the property, that the defendant was entitled to interest on the principal sum to the date of the decree, and upon advances and payments made by him in managing the property; and that the rate of interest was to be governed by the law of this Commonwealth, although the property was to be managed in Colorado.

MORTON, J. This is a bill in equity, the main object of which is to determine the amount which the plaintiff should pay to the defendant to entitle the former to a conveyance by the latter of certain mining property in Colorado, which formerly belonged to the New England Mining Company, and which was sold under a levy of an execution obtained by the defendant, and bought by him for the amount of his execution. The plaintiff was also a creditor of the company, and, by an arrangement between himself and the defendant, was to have an equitable interest in the property.

The case comes before us on exceptions to the report of a master, in regard to his rulings on the questions whether the defendant is entitled to interest, and, if so, at what rate it should be computed.

The rights of the parties depend upon two contracts, entered into by them in this Commonwealth in September 1868. By these contracts, which are to be construed together as parts of one transaction, the parties agree that the amount due the defendant from the mining company was "$2900 and interest from August 20, 1867"; that the defendant should manage the mining property in a manner to be mutually agreed upon from time to time between the defendant and the plaintiff, and that the defendant should convey the property to the plaintiff whenever he realized the amount of his said demand "of $2900 and interest

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as aforesaid, either from sales of ore or other materials formerly belonging to said New England Mining Company, or from money paid over by said Rodney, or both of those sums, in liquidation of said Lauriston's aforesaid demand."

Under these contracts, it cannot be doubted that the master correctly ruled that the defendant was entitled to interest upon the balance of $2900, or such part as remained unsatisfied. It was an overdue account, recognized by the parties to be upon interest, and interest would continue to run upon it until it was satisfied. The necessary implication from the contracts is that such was the understanding of the parties.

We are also of opinion, that the master correctly ruled that the defendant was entitled to interest upon the payments and advances made by him in carrying out the contracts. He was managing the property for the joint benefit of himself and the plaintiff; those payments and advances were made upon the implied request of the plaintiff, and the rule applies, that, where one makes a payment upon the express or implied request of another, the former is entitled to interest from the time of the payment. *Ayer* v. *Tilden*, 15 Gray, 178. *Gibbs* v. *Bryant*, 1 Pick. 118.

The remaining question is as to the rate at which interest should be computed in adjusting the accounts between the parties, it appearing that the legal rate in Colorado is ten per cent, while in Massachusetts, in the absence of any express agreement, it is six per cent. The rule of law is, that interest is to be paid upon contracts according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid. Story Conflict of Laws, § 291. *Von Hemert* v. *Porter*, 11 Met. 210. In the case at bar, the contract of the plaintiff was, that, in order to entitle himself to a conveyance of the property, he would pay the sum of $2900 and interest, or such part as should remain unpaid from the proceeds of the property. It is true that a part of the contract was to be executed by the defendant in Colorado in managing the property in his hands; but the implied promise of the plaintiff to pay was made, and was to be performed, in Massachusetts. We are therefore of opinion that, in applying the rule of law to the peculiar contracts in this case, the interest should be computed at the rate

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which prevails in Massachusetts, and that the decree should be modified accordingly. *Decree accordingly.*

S. H. Tyng, for the plaintiff.

H. J. Fuller, for the defendant.

SAMUEL OSBORN, JR. *vs.* NATHANIEL M. JERNEGAN.

Dukes County. Oct. 25, 1878. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

The plaintiff gave the defendant his promissory note, payable on demand, in consideration of the sale to him of five shares of stock in a railroad company, and on the same day the parties signed an agreement that the sale should be void, if the railroad should be sold under an execution then levied upon it, "or if the surrender of stock as now proposed and the settlement with the creditors according thereto, as now proposed and agreed, shall not be made within sixty days." At the time the note was given, an execution had been levied upon the property of the railroad company, and a plan had been partly carried out by which all the shares of stock were to be surrendered to trustees, who were to issue new stock to the creditors in payment of their debts. Within a month afterwards, the stockholders and the creditors had all signed agreements to carry out this plan, and the interest on the debts had been reckoned and the new stock issued; but the new stock was not actually delivered and the creditors paid until after the expiration of the sixty days. *Held*, that the contingency by which the sale was to become void had not happened; and that an action could be maintained on the note.

COLT, J. This is an action on a promissory note, dated April 6, 1877, and payable on demand, given to the plaintiff, for five shares of stock in the Martha's Vineyard Railroad Company. The defence is, that, when the note was given, it was agreed between the parties, that, upon a contingency which has now happened, the stock should be taken back and the note given up. The question is as to the construction of this agreement.

It appeared that the railroad company was then in failing circumstances. An execution had been levied on its property, and the defendant, as a creditor of the corporation, had an interest in preserving its property from sale on execution, and from proceedings in bankruptcy. A plan had been proposed for securing the creditors, and saving some interest in the property,

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for the old shareholders. It required the surrender of all the stock to trustees, and the transfer to and acceptance of the same by the principal creditors in payment of their debts. Two written instruments had been drawn up, one to be signed by the stockholders, agreeing to surrender their stock, and the other by the creditors, agreeing to accept the same in satisfaction; but these papers, though partly executed, had not then been signed by all the stockholders, or all the creditors. It is evident that, in order to secure his interest as a creditor, the defendant bought the plaintiff's stock, and gave this note, thereby removing one obstacle in the way of completing the arrangement. At the same time, for the purpose of protecting himself in the event of its failure, the written agreement, the construction of which is in question, was made. By this agreement, dated April 6, 1877, the sale was to be void, the stock was to be given up, and the note returned, if, in the words of the agreement, "the railroad shall be sold on execution, as now attached and levied on; or if the surrender of stock as now proposed, and the settlement with the creditors, according thereto, as now proposed and agreed, shall not be made within sixty days from the date hereof."

There was evidence tending to prove that, by the middle of April, the stockholders had all signed the agreement to surrender; that the creditors had signed the agreement prepared for them, and that the railroad corporation had assented to the proceedings, chosen the trustees, and promised to perform all that was required in the premises. The interest on the debts paid was reckoned up to May 1, and the new stock issued bore the same date; but the actual delivery of the stock, and the actual payments to the creditors, did not commence until June 20, and were mostly made in July, more than sixty days after the date of the note in suit and the agreement then made.

The plaintiff asked the court to rule, that, if nothing remained to be done but to transfer the stock, and pay the creditors according to the terms of the agreement between them, then the terms of the agreement between the plaintiff and defendant had been complied with, and the plaintiff had a right to recover on the note.

The judge declined so to rule, and ruled that the legal interpretation of the agreement was, that the actual payment and the

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transfer of the stock to every creditor must be made within sixty days. This instruction is in our opinion too strict and narrow It fails to give sufficient consideration to the situation of the parties, and to their intention and purpose, as ascertained by applying all the provisions of the contract to the subject-matter. It is that general intention which must govern the interpretation, even if in conflict with some word or phrase in the agreement. The contingency really contemplated by the parties, upon which the note was to be given up, was the levy of the execution within sixty days, or a failure to secure within that time the agreement of all the stockholders and creditors to the plan proposed, and not the mere failure within that time to perform the clerical duty of transferring the stock to the creditors, in accordance with a binding agreement seasonably made.

Exceptions sustained.

J. Brown, for the plaintiff.

G. Marston, for the defendant.

JOHN H. NEWHOUSE *vs.* ANTHONY HATCH.

Essex. Nov. 6, 1878. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

A person distraining cattle doing damage on his land impounded them in the town pound and handed the keeper the following written memorandum, with his name and a date upon the paper: "Two dollars for damages and three dollars and fifty cents for fees." *Held*, that the memorandum was defective in not stating the cause of impounding, as required by the Gen. Sts. c. 25, § 27; and that such person was a trespasser *ab initio*.

TORT for the conversion of cattle.

At the trial in the Superior Court, before *Brigham*, C. J., there was evidence on the part of the plaintiff tending to prove the taking of the cattle by the defendant. The defendant, for the purpose of justifying his acts, introduced evidence tending to prove that the cattle were taken as damage feasant in his mowing field; that he drove them to the town pound and delivered them to the pound-keeper; and gave to the pound-keeper a written memorandum, with a date upon it, as follows: "Two

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dollars for damages and three dollars and fifty cents for fees;" and that, at that time, he had furnished no subsistence to the cattle, and made no claim for daily charges of feeding, past and future. Whether or not the defendant's name was upon the paper was in dispute.

The plaintiff asked the judge to rule that this memorandum was insufficient in law; because it did not contain a statement of the sum demanded for the daily charges of feeding the cattle, and was not under the signature of the defendant. But the judge refused so to rule, and ruled that "the memorandum would have been sufficient in any written form of words containing the essentials of the sum of damages and costs demanded and cause of impounding."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. N. Shepard, for the plaintiff.

S. Lincoln, Jr., for the defendant.

GRAY, C. J. This is not a case of cattle found unlawfully at large in the highway and impounded for the purpose of preventing a nuisance and punishing the negligent owner. But the cattle were found doing damage on the defendant's land, and were impounded by him as a means of redress for his particular injury; and the statute required him to leave a memorandum under his hand with the pound-keeper, stating not merely his claim for damages and its amount, but the cause of impounding. Gen. Sts. *c.* 25, §§ 25 – 27. The memorandum in the present case was defective in this respect, and the defendant was therefore a trespasser *ab initio*. *Sherman* v. *Braman*, 13 Met. 407. *Merrick* v. *Work*, 10 Allen, 544.

Exceptions sustained.

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DANIEL WALLIS & another *vs.* JOSIAH BARDWELL & others.

Essex. Nov. 8, 1878. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

A ward is not liable for repairs put upon his dwelling-house by a person employed by the guardian to make them, even after the death of the guardian; and evidence that the repairs were necessary is immaterial.

CONTRACT on an account annexed for labor and materials furnished in the repair of a building upon real estate belonging to the defendants. Answer, a general denial.

At the trial in the Superior Court, before *Colburn*, J., without a jury, it was admitted by the defendants that they were minor children of Josiah Bardwell, who was the duly appointed guardian of each of them; that they were the owners as tenants in common of certain real estate, consisting of a dwelling-house and land in Beverly; that the plaintiffs were employed by the guardian, who has since died, to furnish, and did furnish, the labor and materials sued for, in repairs upon the house; and that the prices were reasonable. The plaintiffs further offered to prove, against the objection of the defendants, that the repairs were necessary. The judge rejected the evidence as immaterial; ruled that, upon the facts admitted, the defendants were not liable; and found for the defendants. The plaintiffs alleged exceptions.

C. A. Benjamin, for the plaintiffs.

S. B. Ives, Jr., for the defendants.

COLT, J. The evidence offered was properly rejected, as immaterial. The rule is, that a guardian can make no contract binding upon the ward, or upon his estate. The guardian has only the control and management of the ward's estate, with no title to it; a power not coupled with an interest. He may make contracts in his own name, but they only bind himself; and the ward does not become a party to them after the death or discharge of the guardian. *Thacher* v. *Dinsmore*, 5 Mass. 299. *Hicks* v. *Chapman*, 10 Allen, 463. *Simmons* v. *Almy*, 100 Mass. 239.

The plaintiffs bring themselves within no exception to the rule. The contract here relied on, moreover, is one which, inde-

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pendently of the rule, would not be binding on the minors, if made by them; for repairs on a dwelling-house are not necessaries in the technical sense of the word. *Tupper* v. *Cadwell*, 12 Met. 559. *Exceptions overruled*

CAROLINE A. BREED *vs.* CITY OF LYNN.

Essex. Nov. 8, 1878. — March 3, 1879. ENDICOTT & LORD, JJ., absent.

The owner of a wharf and dock, who dredges out a channel from his dock over flats belonging to other persons and lying between high and low-water mark, cannot recover damages from a city for an injury to the channel by the discharge of sewage from a common sewer into the dock, whereby the channel is partly filled up and the owner put to additional expense in getting vessels to his wharf; although he dredged out the channel openly and with a claim of right.

A bill in equity, brought by the owner of a wharf and dock, in a harbor, to restrain a city from discharging sewage through a common sewer into his dock, and praying that the city be required either to discontinue the use of the sewer, or to make such change in its construction as to cause it to discharge into the harbor at some other place, was referred to a master to hear the parties and report the form of a final decree, with specific directions to report whether a peremptory injunction should be granted, and whether, and by what other means or scheme, the injury to the plaintiff's estate might be remedied. *Held*, that the master should report upon such means and schemes, proposed by the defendant, although they involved the exercise of the right of eminent domain on the part of the city.

The owner of a wharf and dock let them to a firm of which he was a partner, the firm paying a rent in proportion to the amount of business, and dividing the profits equally between the partners, after deducting charges and expenses, including such rent. A city emptied sewage into the dock, and thereby caused increased expenses to the firm in the transaction of its business. *Held*, on a bill in equity by the owner against the city, that such increased expenses could not be allowed the owner as damages, or considered as expenses of his estate.

GRAY, C. J. This is a bill in equity by the owner of a wharf and dock in the city of Lynn, bounding on Lynn harbor, for a nuisance, in discharging filth, through a common sewer constructed by the defendant, into the plaintiff's dock, and thereby partially filling it up and rendering it unfit for navigation. The bill prays for a perpetual injunction against so maintaining the sewer that its contents shall be discharged into the plaintiff's dock; for a decree that the defendant be required either to discontinue the

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use of the sewer, or to make such change in its construction as to cause it to discharge its contents into the harbor at some other place and below low-water mark; and for damages.

Neither party appears to have been very diligent, the plaintiff in prosecuting her suit to a final decree, or the defendant in attempting to remove the nuisance complained of. The bill was filed in February 1876. The first interlocutory decree was entered at April term 1877, when it was ordered that the bill should be taken for confessed, and that the further consideration of the cause, of the nature of the relief to be granted to the plaintiff, and of the question of damages, should be postponed until the defendant should have had an opportunity to remedy the injuries complained of. The cause next came on for hearing in April 1878, when, upon the motion of the plaintiff for a final decree, it was ordered, by consent of parties, that the question of the form of the relief to be granted should be further postponed for one month, with liberty to the plaintiff then to renew her application for an injunction, or for other relief, and that it be meanwhile referred to a master to assess the damages. In June 1878, at a further hearing on the plaintiff's motion for a final decree, it was ordered that it be referred to the same master "to hear the parties, and make report to this court as to the form of a final decree, and therein specifically to report: First. Whether a peremptory injunction should be granted to the plaintiff, restraining the defendant from maintaining the sewer mentioned in the bill, as prayed for in the bill. Second. Whether any other means, and if so, what means, of remedying the injuries complained of in the bill, are practicable, and ought to be required of the defendant by decree of this court. Third. Some scheme by which the sewage now discharged into the dock of the plaintiff may be diverted therefrom and discharged into the harbor of Lynn at some other place, without injury to the plaintiff's estate. And the further consideration of said cause is postponed until the coming in of said master's report, and of the report of the same master upon the question of damages." In October 1878, the cause came on to be heard before a single judge upon the bill, interlocutory decrees, master's report and exceptions of both parties thereto, and was thereupon reserved for the consideration of the full

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court; such decree to be entered as the former decrees and the master's report might require, and it being agreed that the decree taking the bill for confessed should not preclude the defendant from relying upon its exceptions to the master's report.

The defendant excepts to the master's report; 1st, "because said master allowed the plaintiff's claim for damages in the sum of $400 for filling up the channel outside the limit of her ownership and right of dockage;" and 2d, "because he refused to pass upon the propositions or scheme to relieve the nuisance, offered by the defendant."

The master's report states that in 1872 the plaintiff's husband (whose title the plaintiff had acquired as tenant in dower and purchaser of the reversion) dredged out a channel, to the depth of four feet below the level of low water, and more than a thousand feet long, about one fourth of which was within his own dock, and the rest extended seaward through flats between high and low-water mark owned by other persons; "that it was dug out openly, and as if with claim of right, without objection from any of the shore owners, and before any boundary lines between the proprietors of these flats had been established;" and that this channel had since gradually filled up, and thereby increased the expense of doing business at the wharf, from lightening the cargoes of vessels of larger draught, and from the employment of vessels of less draught than formerly at a higher rate of freight. Upon these facts, the master was of opinion that the plaintiff's husband in his lifetime acquired a special right to have and maintain this channel, which was of value to his estate, and which he did not share in common with the general public, and that his right in the premises passed to the plaintiff, and she was entitled to recover against the defendant, as damages to her estate, the cost of removing so much of the obstruction to this channel as appeared to have been caused by the action of the sewer in question; and found and reported the amount of the damages, so caused, for the filling up of the plaintiff's dock within the limit of her ownership and right of dockage, at $350, and for the filling of the channel outside that limit and within low-water mark, at $400. The defendant does not except to the allowance of the first, but only to the allowance of the second of these sums.

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We are of opinion that this exception is well taken. The plaintiff and her husband never acquired any title or easement, by grant or prescription, in the flats beyond the limits of their ownership. If the filling up of the channel beyond that limit, by which the access to their wharf was rendered more difficult or expensive and the wharf less valuable, could be the subject of prosecution in any form, the injuries to them did not differ in kind from those suffered by other persons owning lands bounding on the harbor or navigating over the flats, and the remedy must be sought by indictment for an injury to the public right of navigation, and not by private suit. *Brayton* v. *Fall River*, 113 Mass. 218. *Blackwell* v. *Old Colony Railroad*, 122 Mass. 1. *Thayer* v. *New Bedford Railroad*, 125 Mass. 253.

That part of the master's report which relates to the other exception of the defendant is as follows: "The plaintiff offered no evidence, and made no suggestions, as to any scheme for relief from the effects of the nuisance; but claimed her right to have the nuisance abated by a discontinuance or removal of the sewer, without suggestion from her as to the mode of abating the nuisance. The defendant offered for consideration several propositions; but as they all involved the exercise of the right of eminent domain on the part of the city authorities, and neither of them had been adopted or approved by the city, I was of opinion that I ought not to attempt to pass upon them, or to propose what action shall be taken by the legally constituted authorities in the exercise of their jurisdiction. And no other suggestion or proof being offered upon the subject, I find and report that there is no plan for the relief of the plaintiff, other than by enjoining the defendant from further maintaining the said sewer by order of the court."

The plaintiff, upon establishing to the satisfaction of the court that the sewer is a private nuisance to her property, is doubtless entitled to an injunction against the city, as she would be against an individual; but the court, in granting such an injunction, always postpones its operation for a reasonable time, in order to enable the defendant to take adequate measures to remove the nuisance without unnecessary injury to the public health or interests. *Haskell* v. *New Bedford*, 108 Mass. 208. *Boston Rolling Mills* v. *Cambridge*, 117 Mass. 396, 401. *Attorney Gen-*

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eral v. *Birmingham*, 4 K. & J. 528, 548. *Spokes* v. *Banbury Board of Health*, L. R. 1 Eq. 42, 51. *Goldsmid* v. *Tunbridge Wells Commissioners*, L. R. 1 Eq. 161, 170, and L. R. 1 Ch. 849. *Attorney General* v. *Bradford Canal*, L. R. 2 Eq. 71, 84. *Attorney General* v. *Colney Hatch Asylum*, L. R. 4 Ch. 146, 163; *S. C.* cited in *Attorney General* v. *Gee*, L. R. 10 Eq. 131, 135.

In the present case, the bill having been taken for confessed, no hearing on the merits was had before the court; but the court, in order to inform itself of the circumstances which might affect the terms of the injunction, referred it to the master to hear the parties and report the form of a final decree, with particular directions to report whether a peremptory injunction should be granted, and whether, and by what other means or scheme, the injury to the plaintiff's estate might be remedied; and no appeal was taken from that decree. At the hearing before the master, the defendant offered for consideration several propositions, which the master declined to pass upon or report, for the sole reason that they all involved the exercise of the right of eminent domain on the part of the city. We are of opinion that in this the master erred. It is not necessary now to consider whether the court has authority to compel the city to adopt specific measures which would involve the exercise of the right of eminent domain entrusted to the city by the Legislature. It is sufficient to say that it is important for the court to know the nature of the remedies which it is within the power of the city to adopt, in order that the court may judge whether a peremptory injunction should issue, and, if so, when it should be ordered to take effect. The defendant's second exception to the master's report is therefore also sustained.

The remaining question arises upon the plaintiff's exception to the disallowance by the master of her claim for damages to her estate for the increased expense, occasioned by the filling up of the dock, to the partnership of which she was a member, and which by the agreement of copartnership was to have the right to use and occupy the wharf and dock, paying to her as rent a sum in proportion to the amount of business, and to divide the profits of the business equally between the plaintiff and the other partner, after deducting charges and expenses, including

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such rent. Upon this question the court concurs in the opinion of the master, that the increased expense incurred by the partnership cannot be taken into the account as due to the plaintiff individually, nor in any way reckoned as an item of damage to the estate of which she is the owner.

The result is, that the plaintiff's exception must be overruled, the defendant's exceptions sustained, and the case

Recommitted to the master.

S. B. Ives, Jr., for the plaintiff.

R. E. Harmon, for the defendant.

LOUIS J. PAPINEAU *vs.* NAUMKEAG STEAM COTTON COMPANY.

Essex. Nov. 6, 1878. — March 10, 1879. ENDICOTT & LORD, JJ., absent.

A., who was in the employ of a corporation, gave B. an order on the corporation for a certain sum, to be paid monthly, in specified instalments, out of his wages. The paymaster of the corporation said he would take charge of the order, and if there was no trouble about it he would pay it. As each instalment came due, B. demanded it, but was refused payment. The paymaster took the money out of A.'s wages, and put it in an envelope marked with B.'s name. No attachment was made of the money in the hands of the corporation. *Held*, that B. could not maintain an action for money had and received against the corporation.

CONTRACT for money had and received. Answer, a general denial. At the trial in the Superior Court, before *Brigham*, C. J., the plaintiff offered to prove the following facts:

On June 9, 1874, Peter Pelletier brought an action by trustee process against Joseph Couillard, who was then in the employ of the defendant corporation. At that time Pelletier was indebted to the plaintiff in this action; and, by an agreement between the parties, it was arranged that Pelletier should discontinue the trustee suit, and Couillard should settle the accounts between himself and Pelletier, and between Pelletier and the plaintiff, by paying the costs of the trustee suit ($5) and $38 directly to the plaintiff. Couillard, in accordance with this agreement, executed an order addressed to the treasurer of the defendant corporation,

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requesting him to pay the $5 on the first day of July, and the residue to the plaintiff in this action, in specified instalments on the first day of each following month.

This order was signed by Couillard in the defendant's office, in the presence of the clerk of the defendant corporation, who acted as paymaster and usually took charge of all such orders and assignments, and who immediately thereupon paid the first instalment of five dollars to the payee. The order was not recorded, but left with the defendant's clerk, who kept it, saying he would take charge of it, and if there was no trouble about it he would pay it, or words to that effect; and he then attached it to the copy of the writ in the trustee suit, and filed both away among the defendant's papers. Subsequently, as each pay-day occurred, the plaintiff called at the office of the defendant and made demand of the clerk for the payment of the instalments as they fell due, but was refused payment. When the whole sum was due, the plaintiff was told by the clerk that the money had been collected of Couillard out of his wages, according to the terms of the order, and put into a separate envelope marked with the plaintiff's name, and the money and envelope were shown to the plaintiff; but the clerk further said that the money could not be paid over to him. The plaintiff asked if anybody had attached the money, and was told that nothing of that kind had been done. The plaintiff then again demanded the money of the defendant, but was again refused; he then demanded the order, but that also was refused him.

The judge ruled that, upon these facts, the plaintiff could not maintain his action in the present form, if at all, inasmuch as the money sued for was not the money of the plaintiff, but was Couillard's money until actually paid over to the plaintiff; and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

S. B. Ives, Jr., (*N. J. Holden* with him,) for the plaintiff.

C. Sewall, for the defendant.

SOULE, J. The order of Couillard on the defendant, in favor of the plaintiff, was not an order for payment of all that should be due the drawer as wages at the several times when the instalments were to be paid. It was not, therefore, an assignment of wages to the plaintiff, unless the defendant saw fit to assent to it

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as such, but a mere order for money. *Gibson* v. *Cooke*, 20 Pick. 15. *Dana* v. *Third National Bank*, 18 Allen, 445. If it were an assignment, it would not enable the plaintiff to maintain an action in his own name, except on proof of a promise by the defendant to the plaintiff to pay him. *Riley* v. *Taber*, 9 Gray, 372. *Foss* v. *Lowell Five Cents Savings Bank*, 111 Mass. 285. Such acceptance or promise is not shown. The statement of the clerk of the defendant, that he would pay the order if there was no trouble about it, was not a promise, but rather a refusal to assume responsibility, leaving the question of payment to be determined by his employers at some future time. The separation and retention by the clerk of the amount of the successive instalments, and placing them in an envelope marked with the plaintiff's name, did not change the legal relations of the parties, nor the ownership of the money so separated and retained. It was accompanied by refusal to pay it to the plaintiff, which precludes the inference of any promise to him; and the money remained in the control of the defendant to use as it saw fit to use it. The wages of Couillard remained unpaid to the amount thus retained by the defendant, and a suit in his name could have been maintained to recover the balance due. *Exceptions overruled.*

LAURA S. READMAN *vs.* THOMAS H. CONWAY & another

Essex. Nov. 7, 1878. — March 10, 1879. ENDICOTT & LORD, JJ., absent.

The owner of a lot of land abutting on a highway, on which is a building consisting of three shops, and having a wooden platform extending from it to the sidewalk, with no barriers separating the parts of the platform in front of the several shops from each other, and which is constructed for the common use of all the shops and used by the public as a common passageway thereto, is liable to a person who, in the exercise of due care, is injured by a defect in the platform, in the absence of an agreement by the tenants of the shops to keep it in repair.

On the issue of fact whether a landlord or his tenant was to keep in repair a platform in front of a shop, evidence that, after an injury caused by a defect in the platform, the landlord repaired it, is competent as an admission that it was his duty to keep the platform in repair.

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TORT for personal injuries sustained by the plaintiff from a defect in a platform in front of a building on land owned by the defendants in Lawrence. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the plaintiff; and the defendants alleged exceptions, the substance of which appears in the opinion.

D. Saunders & C. G. Saunders, for the defendants.

E. T. Burley, for the plaintiff.

MORTON, J. The defendants are the owners of a building, consisting of three shops or tenements, standing forty feet back from the line of Essex Street in Lawrence, and having a wooden platform extending from it to the sidewalk of Essex Street They made oral leases of these shops, each to a separate tenant. The platform had no fences or lines of any kind separating the parts thereof in front of the several shops from each other, but was entirely open, so that persons passed over it in any direction in going to either of the shops. The verdict of the jury establishes the fact that the plaintiff, while in the exercise of due care, was injured by a defect in the platform for which the person whose duty it was to keep it in repair was responsible, the only disputed question which is affected by the exceptions before us being whether her remedy was against the landlords or the tenant. The evidence was conflicting upon the question whether by the terms of the leases the landlords were to keep in repair the whole of the platform, or each tenant was to keep in repair the part in front of his shop.

In this state of the case, the defendants asked the court to instruct the jury as follows: "1. In the absence of an express agreement, on the part of the landlord, to do repairs, the tenant is bound in law to keep the tenement in repair; and he, not the landlord, is responsible for any injury arising from the want of repair. 2. The occupier and not the landlord is bound, as between himself and the public, so far to keep buildings and adjoining structures abutting upon highways in repair, that they may be safe for the use of travellers therein; and, *prima facie*, such occupier is liable to third persons for damages arising from such defect."

These requests state general propositions of law, which in many cases might be correct and sufficient. But in the case at bar the

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principal question in dispute was whether the tenants of the shops were the tenants or occupiers of the platform within the meaning of these rules of law. There was evidence which would justify the jury in finding that the platforms were not leased to the several tenants, but that the understanding was that they were constructed and were to be kept open and controlled by the landlords, for the common use of the occupants of all the shops and of the public. If they so found, the tenants would not be liable for defects in the platform, but the responsibility therefor would remain upon the landlords. *Kirby* v. *Boylston Market Association*, 14 Gray, 249. *Milford* v. *Holbrook*, 9 Allen, 17. *Shipley* v. *Fifty Associates*, 101 Mass. 251.

The presiding justice properly declined to give the instructions requested without qualification or explanation; and the instructions given in explanation were appropriate and correct.*

If the lease to each tenant was of the shop occupied by him, and the landlords had constructed a platform for the common use and benefit of all the shops and of the public, there would be no presumption, in the absence of any agreement to that effect, that the tenants were to keep the platform in repair. Neither tenant acquired any exclusive right to use or control the part of the

* The instructions given were as follows: "If the jury find that this platform, down to the time of the injury, had been used by the public in its entire width as a common passageway to the three shops, and that this was known to the defendants, and that there was no division fence upon the platform, — unless, by the terms of the defendants' letting to them, or their occupation under such letting, the tenants were required to maintain the platform, as a part of their tenement, in safe condition for persons lawfully on it, — the defendants were required to keep the same in safe and convenient condition, and would be liable to the plaintiff for any injury caused by their neglect of such duty, provided there was no want of reasonable care on the part of the plaintiff. The law presumes the legal obligation of a tenant to maintain the repairs of his tenement, in the absence of evidence of an agreement between him and his landlord that his landlord and not he shall make such repairs; and the law presumes the legal obligation of a tenant, as between himself and the public, to keep his tenement, if it abuts on a highway, in such a condition of repair that persons could travel with safety in the highway on which it abuts, and safely, when on lawful business, enter and leave such tenement, from and to the highway on which it abuts; and there is a legal responsibility of a tenant, arising from such presumed obligation, to a person injured by the unsafe condition of a place within the limits of his tenement,

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platform in front of his shop, and there was no such leasing of the platform as would exonerate the landlords from responsibility for defects in it. *Milford* v. *Holbrook*, *ubi supra*.

The only other exception argued by the defendants is that to the admission of evidence that, after the plaintiff's injury, they made general repairs of the platform. These acts of the defendants were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent.

Exceptions overruled.

MICHAEL J. MORRISSEY *vs.* EASTERN RAILROAD COMPANY.

Essex. Nov. 8, 1878. — March 24, 1879. ENDICOTT & LORD, JJ., absent.

A railroad corporation is not liable for running over a child who is using the track of the corporation as a playground, if the act is not done maliciously or with gross and reckless carelessness.

TORT for injuries to the plaintiff, a child four years of age, by being run over by a railroad train of the defendant. Trial in this court, before *Gray*, C. J., who, after a verdict for the de-

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over which such person when injured was passing on lawful business, from and to such highway. These presumptions would not apply to a tenant whose tenement consisted of a shop which was one of three adjoining distinct and separate shops, attached to all of which was a platform, extending a distance of forty feet from them to a highway, and constructed by the landlord for the common use of all the shops, and accessible to and used in every part of it by the tenants of the shops, and to and by all persons having occasion to pass from and to the highway over the platform, and from and to the shops. The presumption of law would be, that such a platform, in the absence of any agreement, between the landlord and tenants of such shops, as to the repairs of it, was to be repaired by the landlord. Such a platform would be like the single staircase provided by the landlord of a building consisting of several stories, divided into numerous tenements occupied by different tenants, all of whom had right of ingress and egress into and from the building and their respective tenements, by means of the common staircase, and all of whom might be presumed to be obliged to repair their respective tenements, and none of whom could be presumed to be obliged to repair the staircase, common to the use of every one of them and of their tenements."

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fendant, reported the case for the consideration of the full court, in substance as follows:

The defendant's railroad, at the place of the accident, consisting of a single track, after leaving the station at Gloucester, crosses Cedar Street, and, at a point about four hundred feet from the station, enters a cut through a ledge, upon a curve. The ledge rises upon both sides of the track and extends a short distance. Upon both sides of the track, in the rear of this ledge and beyond it, are houses, in one of which the plaintiff lived with his mother. At a point about one hundred and thirty feet from Cedar Street there is a path across the track made by foot passengers. This was not a public way, highway, nor travelled place, where the defendant was required by statute to maintain warning boards, and it was not contended that the plaintiff or his mother had any private rights in this path.

Testimony was introduced for the plaintiff, tending to show that the passageway described was open to every one to use and that it was so used; that the houses above referred to were not standing there when the railroad was built, and that this passageway was not used before the houses were built; and that the whistle was not blown, nor the bell rung, on the engine, either in its approaching the crossing or at any time.

Richard Morey, a boy of fifteen years, testified that, at the time of the accident, he was playing upon the ledge and became aware of the approach of the train by the puffing of the engine; that he then looked and saw the plaintiff quite alone, kneeling by the side of the track with his head over the rail; that he appeared to be putting something upon the rail and was stooping over it; that the witness ran as fast as he could and pulled him away, but that the engine struck him just as he seized him, and ran over his arm and foot; and that the spot where this occurred was more than a hundred feet distant from Cedar Street, and opposite an opening by the side of the track where there was no fence, and through which led the path before referred to.

Catherine Morrissey, the mother of the plaintiff, testified that she was at home on the day of the accident, and that the plaintiff was there in her care; that he had been in a field near by where she watched him through the window; that he was "all

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the time running to the track" if she let him out a minute; that she went into the cellar to get some kindling-wood, and the boy was then up-stairs; that she went to saw the wood and the boy was then around her and was talking with her; that the first thing she knew she missed him and heard a scream; that she was not more than a minute cutting wood; that she had great trouble to keep the boy from the trains; that he was in the habit of watching for a chance to run to them, and that she had taken off his shoes and stockings in the afternoon so that he would play in the field and not run over the way to the track, which was rough; that this way was not very rough; and that she heard no whistle or bell or any sound of an approaching train.

The engineer of the train testified for the defendant, that he was at his post attending to his duties; that he did not remember whether or not the whistle was blown or bell rung, but supposed this was done, as it was usually rung; that the omission to ring the bell would have attracted his attention sooner than the ringing, and his attention was not attracted to the matter by anything unusual; that he did not see the plaintiff before or after the accident; and that the right-hand rail of the track (upon which side the plaintiff was) was visible from the station to the place where the plaintiff was hurt. There was no other evidence tending to show acts of malice or wilful carelessness on the part of the defendant.

The plaintiff further offered the evidence of John Morey, to the effect that he lived in the vicinity of the crossing at Cedar Street; that, for the purpose of notifying the defendant, he had verbally notified its station agent at Gloucester that the passageway referred to was a very dangerous place for children, and that there was no fence across it, and had requested the agent to have a fence erected there; that the agent replied that it was not his duty to attend to the matter; and that, on further request of the witness, he refused to notify or name the official of the road to whom notice of these facts and such request should be given. The judge excluded the evidence.

The defendant requested the judge to rule that there was no evidence which would warrant the jury in returning a verdict for the plaintiff, either on the ground that the defendant had

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acted maliciously or with gross and wilful carelessness, or on the ground that the plaintiff's injuries had resulted from the tortious acts of the defendant without contributory negligence on the part of the plaintiff or of those in charge of him. But the judge refused so to rule, and submitted the case in both aspects to the jury, who returned a verdict for the defendant.

If the evidence offered by the plaintiff was rightly excluded, judgment was to be entered on the verdict; if it was erroneously excluded, a new trial was to be granted, unless, upon all the evidence, the jury would not have been authorized to find a verdict for the plaintiff, in which case the verdict was to stand, and judgment was to be entered accordingly.

C. A. Benjamin, for the plaintiff.

S. Lincoln, Jr., for the defendant, was not called upon.

AMES, J. The only evidence offered by the plaintiff, and excluded by the court, was the testimony of Morey as to a conversation between himself and the station agent at Gloucester. This evidence was offered for the purpose of showing that the defendant had been notified that the place where the accident afterwards happened was dangerous to children for want of a suitable fence, and had been requested to erect such a fence. It is unnecessary particularly to consider the competency of this evidence, because we are of opinion that, upon all the evidence offered at the trial, the jury would not have been authorized to return a verdict for the plaintiff.

The plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad track. No inducement or implied invitation to him to enter upon it had been held out. He was neither a passenger nor on his way to become one, but was there merely for his own amusement, and was using the track as a playground. The defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him. *Johnson* v. *Boston & Maine Railroad*, 125 Mass. 75. Upon this question, and also upon the question whether the plaintiff's injuries had resulted from the tortious acts of the defendant, without contributory negligence on the part of the plaintiff or of those who had him in charge, the case was submitted to the jury with instructions of which no complaint is made on his behalf. The verdict

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was for the defendant, and we do not think that any other verdict could have been authorized by the evidence. Therefore, by the terms of the report, there must be

Judgment on the verdict.

HERBERT FULLER, administrator, *vs.* JOHN P. T. PERCIVAL & another.
SAME *vs.* SAME & others.

Suffolk. Nov. 27, 1877.—March 1, 1879. AMES & LORD, JJ., absent.

B., a member of a firm, of which he and A. were partners, fraudulently made a promissory note in the name of the firm, and delivered it to C., who had knowledge of the fraud. The firm was afterwards dissolved and a receiver appointed. A., after the note became due, and while it was still in the hands of C., no suit having been begun on it, brought a bill in equity against B. and C., the prayer of which was that C. might be ordered to produce and cancel the note and restrained from enforcing it. *Held*, that the bill could be maintained.

B., a member of a firm, of which he and A. were partners, fraudulently made a promissory note in the name of the firm, and delivered it to C., who had knowledge of the fraud. C. delivered it to D., an innocent holder for value. The firm was afterwards dissolved and a receiver appointed. D. brought an action at law upon the note. A. then brought a bill in equity against B. and C., the prayer of which was that C. might be ordered to pay, take up and cancel the note, and be restrained from enforcing it. *Held*, that the bill could not be maintained.

COLT, J. These are two bills in equity, originally brought by Henry D. Fuller. On his death his administrator was admitted to prosecute them. In both of the bills it is alleged that the notes to which they relate were given by the defendant Gustavus Percival, who with Henry D. Fuller composed the firm of Percival, Fuller & Company; that they were given in the name of the firm, by Gustavus, without the knowledge of his copartner, in fraud of the firm; and that this fraud was known to and participated in by the defendant John P. T. Percival. The two notes for $2500 each, for relief against which the first suit is brought, were notes payable on demand, and are still retained by John. The note for $5000, to which the second suit relates, was payable in ninety days, and was passed by

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John to third parties, who claim to be, and upon the allegations in the bill must be taken to be, innocent holders. The latter have brought an action at law upon the note against the firm, which is now pending, but they are not made parties to the bill.

The oath of the defendants in each case is waived. The prayer in the first case is, that John may be ordered to produce and cancel the two first-named notes, and may be restrained from enforcing them; and in the second, that he may be ordered to pay, take up and cancel the larger note, and be restrained from enforcing it. In each case, a demurrer for want of equity was overruled, and the order appealed from, and a decree for the plaintiff on the final hearing was also appealed from.

The weight of modern authority supports the jurisdiction in equity of suits for the cancellation of written instruments obtained by fraud. It is exercised for the purpose of affording relief against invalid executory contracts in the possession of another, where the invalidity is not apparent on the instrument itself, and where the defence may be nullified by intentional delay to sue until the evidence in support of it is lost. Adams Eq. 174. In *Hamilton* v. *Cummings*, 1 Johns. Ch. 517, Chancellor Kent, after a full and critical examination of the English cases, declares that he is inclined to the opinion, that the jurisdiction is to be upheld whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause. But further on he adds, that "perhaps the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defence not arising on its face may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation."

This doctrine was recognized by this court in *Commercial Ins Co.* v. *McLoon*, 14 Allen, 351, where a bill alleging that the defendant had obtained a policy of insurance by fraud, which

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gave him an apparent cause of action, from which the plaintiff was in danger, and praying that the policy might be given up and cancelled, was sustained. See also *Martin* v. *Graves*, 5 Allen, 601; *Peirsoll* v. *Elliott*, 6 Pet. 95; Story Eq. Jur. §§ 694, 700.

As to the first case, the plaintiff upon the allegations in the bill comes within the recognized jurisdiction of the court. The notes are in the possession of a fraudulent holder, who has demanded payment of the plaintiff; they are negotiable, and although overdue may be sued by such holder, or by others to whom he may hereafter transfer them, to the embarrassment of the plaintiff, and no suit at law has yet been commenced upon them. The partnership is dissolved and its affairs are in course of settlement in this court, its effects being in the hands of a receiver. The plaintiff cannot try the question of the partnership liability at law until such time as John P. T. Percival may see fit to bring his action. The settlement of the affairs of the firm must be delayed until the question is settled. And, upon the whole, we are of opinion that the plaintiff is entitled to the relief he seeks. It is more effectual than it can be at law, because it is more speedily afforded, and enables the plaintiff to protect himself before the evidence is lost. In this case the entry must be

Decree affirmed.

But different considerations apply to the second suit. An action at law is now pending against the firm, upon the note to which the second suit relates, in favor of the present holders of that note. It is not alleged in this bill that the plaintiff has any defence which can be availed of against the holders of that note. The allegation is that John P. T. Percival fraudulently negotiated it to the present holders for the purpose of enabling them to collect it out of the property of the firm. The plaintiff cannot escape his liability to the holders. Upon the payment of the note he may at once commence an action at law in his own name alone to recover for the fraud alleged to have been practised upon him, and in that action his remedy is full, adequate and complete against the parties to the fraud. *Longman* v. *Pole*, Mood. & Malk. 223. Story Part. § 256. The remedy at law would be as speedy and as effectual as a remedy by decree in this suit requiring the defendant John P. T. Percival to give

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bond for the payment of the judgment to be recovered in the pending action at law, or to pay the note and surrender it for cancellation. And in this second case the entry must be

Bill dismissed.

W. B. Gale, for the defendants.
C. Allen & H. Wardwell, for the plaintiff.

CITY OF BOSTON *vs.* NATHAN ROBBINS.

Suffolk. Nov. 14, 1878. — March 8, 1879. COLT & MORTON, JJ., absent.

Where the owner of land in fee has made a lease of the whole for years, and the lessee has assigned the lease to two persons, for the remainder of the term, before a portion of the land is taken for the alteration of a highway, whereby a part of the building is cut off, and extensive repairs made necessary, entire damages may be assessed for such taking, and be paid to a trustee, under the Gen. Sts. c. 43, §§ 17, 18, and need not be apportioned between the parties interested, according to §§ 53–58, although by the terms of the lease the lessee is to have the right to take down buildings on the land and erect new ones; and is to make repairs, and to give up the premises at the end of the term in good repair, and to pay all taxes and duties levied during the term; and although, by an agreement between the lessee and the assignees, the latter are to make certain repairs and improvements on the premises, to be paid for by the former, and to reconvey the lease when such payment is made; and although, at the time of the taking, the premises are sublet to tenants at will.

Where the Probate Court has jurisdiction to appoint a trustee under the Gen. Sts. c. 43, §§ 17, 18, to recover the damages sustained by persons having separate interests in land taken for a highway, the regularity of its proceedings in the appointment of the trustee cannot be impeached in an action by the trustee against the city taking the land.

A trustee appointed by the Probate Court under the Gen. Sts. c. 43, §§ 17, 18, to receive and collect damages awarded by a city for land taken for a highway, may, after a demand and a refusal to pay, maintain an action at law against the city for the damages awarded.

If land, held by two persons as trustees, is taken by a city for a highway, an arbitration entered into between a lessee and one of the trustees only, in accordance with which the city pays a sum of money to the lessee, is void.

WRIT OF REVIEW to revise a judgment recovered by the defendant in review against the plaintiff in review. After the former decision, reported 121 Mass. 458, the case was tried in the Superior Court, without a jury, before *Colburn*, J., who allowed a bill of exceptions in substance as follows:

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The original action was brought by Nathan Robbins, trustee, after a demand and refusal to pay, to recover from the plaintiff in review the sum of $8889, being the sum awarded by the board of aldermen to Franklin S. Simonds, Jonathan B. Simonds and George W. Simonds, trustees under the will of Jonathan Simonds, for a portion of their land taken on November 15, 1869, for the purpose of widening Eliot Street.

The order of the board of aldermen taking the land contained an estimate of damages, in which the "value of land taken" was estimated at $5089, the "damages to building, owners and occupants" at $3800, and the entire damages at $8889.

At the time of the taking and award, Franklin S. Simonds had died, and the whole estate was owned by Jonathan B. Simonds and George W. Simonds, as surviving trustees, and was subject to a lease executed by the three trustees on December 2, 1854, to Charles W. Rosenfeld, for the term of eighteen years from January 1, 1855. By the terms of the lease, the lessee was to have the right to take down the buildings then on the land and to erect new ones. He was also to make repairs, and to give up the premises at the end of the term in good repair; to keep the buildings insured against loss by fire; and to pay the rent quarterly, and all "taxes and duties" levied during the term. On May 31, 1856, this lease was assigned, for the residue of the term, to Job A. Turner and Joel Snow, copartners, they agreeing, by an instrument of even date, to make certain repairs and improvements on the premises, to be paid for by Rosenfeld, and to reassign the lease, which was described and referred to, when such payment was made in full.

At the time of the taking by the city, the premises were occupied by different tenants, who held as tenants at will under Turner and Snow. After the taking, the assignees, with the knowledge and assent of George W. Simonds, repaired the building on the estate, which had been cut off in the widening, at an expense of $2000. After the city passed the order of taking, the tenants at will moved out, and the premises were vacant, until restored after the widening. The assignees of the lease were deprived of the use of the premises for a considerable time, and suffered damages thereby.

On July 2, 1870, Joel Snow assigned his interest under the

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lease, and his claim against the city, to Reuben S. Wade. On January 21, 1871, George W. Simonds and Job A. Turner entered into an arbitration to determine what parts of the sum awarded by the city should be paid to the owners of the land, and to the lessees. The arbitrators, on February 10, 1871, awarded the sum of $3200 to the lessees. On March 20, 1871, the city passed an order that this sum should be paid to Turner; and it was so paid, he, with Wade as surety, giving a bond of indemnity to the city.

Wade had knowledge of the arbitration and award, and assented verbally to the same. About $2000 of the money received from the city was spent in repairing and restoring the building to make it fit for use after the widening, and the balance was equally divided between Turner and Wade. After the assignment of the lease, Jonathan B. Simonds, as trustee, collected the rent up to about 1860; and after that George W. Simonds collected it, and the assignees dealt exclusively with him in regard to the estate up to the time of the arbitration; and the money was paid to Turner and Wade with his knowledge and consent. In making the agreement of arbitration Jonathan B. Simonds took no part, he did not know of or consent to the same, and was not consulted in reference thereto.

On November 9, 1871, George W. Simonds was dead, and Jonathan B. Simonds, who was the sole surviving trustee, filed a petition to the Probate Court, under the Gen. Sts. *c.* 43, §§ 17, 18, setting forth the taking of a part of the estate by the city; that Turner was a tenant of the estate at the time of the widening; that no other persons were interested therein; that the petitioner and Turner could not agree as to a division of the damages awarded; that the petitioner had applied to Turner to agree upon a person as trustee to receive the money; and praying for the appointment of a trustee. A citation was issued to Turner, and served by leaving it at his last and usual place of abode; and a decree was passed appointing Nathan Robbins trustee "to receive and collect said damages." Turner did not actually receive or know of the notice; and neither he nor Wade nor Snow took any part in the proceedings in the Probate Court; and Turner was not called upon to agree to a trustee, as alleged in the petition.

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The defendant in review contended that the decree of the Probate Court could not be impeached in this action. The plaintiff in review contended that the appointment of Robbins as trustee was irregular, illegal, unauthorized and void; that the Probate Court had no jurisdiction or authority to appoint a trustee; that Robbins, as trustee or otherwise, could not legally claim, and was not entitled to recover, the amount of the estimated damages; that the trustees of Simonds were bound by the arbitration and award, and by the payment of money thereunder; that, if entitled to recover at all, Robbins could recover only for the balance left after the payment to Turner by the city; that the action would not lie at all upon the estimate or order of the said city referred to; that Turner and Wade were entitled to recover, and have apportioned to them, the damages caused to the building repaired by them, to the extent of the costs of the same paid by them, and for depriving them of the occupation of their tenants.

Upon the foregoing facts, the judge ruled, as matter of law, that the plaintiff in review could not recover, and ordered judgment for the defendant in review; and the plaintiff in review alleged exceptions.

A. A. Ranney, for the plaintiff in review.

J. O. Teele, (*C. R. Train* with him,) for the defendant in review.

SOULE, J. The bill of exceptions shows that the estates of the tenant for years and of the reversioner each extended to the whole of the land taken by the plaintiff in review. The case, as now presented, is in this respect the same as when it was last before us. *Boston* v. *Robbins*, 121 Mass. 453. The provisions in the lease giving the lessee rights which were not incident, as of course, to his tenancy, and imposing on him duties which do not necessarily fall on a lessee for years, were not such modifications of the relation of the tenant and the reversioner as to make their interests other than merely successive in point of time in the whole premises taken. The damages for the land taken were therefore to be assessed and awarded in a gross sum, and were payable to a trustee to be appointed in accordance with the Gen. Sts. *c.* 43, §§ 17, 18. It follows that the judge of probate had jurisdiction of the subject-matter of the petition

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of Simonds for the appointment of a trustee to receive and collect the damages. This being so, the decree appointing the defendant as such trustee, not having been reversed on appeal, is conclusive, and cannot be impeached in this action at law in a court of common law jurisdiction, by a party having no interest in the question presented by the petition. *Dublin* v. *Chadbourn*, 16 Mass. 433. *Emery* v. *Hildreth*, 2 Gray, 228. *Parker* v. *Parker*, 11 Cush. 519. *Pinney* v. *McGregory*, 102 Mass. 186.

By the St. of 1866, *c.* 174, § 3, the damages for the land taken, as estimated by the board of aldermen, became payable in the manner provided by the Gen. Sts. *c.* 43, § 18. By the decree of the judge of probate, the defendant became entitled to collect the amount as trustee for the parties in interest. Having demanded payment, which was refused, his only remedy was by action of contract.

The agreement of arbitration, and the proceedings under it, and payment by the plaintiff to Turner, do not affect the rights of the defendant. Jonathan B. Simonds and George W. Simonds were interested in the damages only as owners in trust of the land taken. One of the trustees had no power to make conveyance of any part of the trust property, nor to make any agreement for disposing of any part of it, without the assent and cooperation of his co-trustee. The arbitration and award under it were therefore void as against the trust estate. *Chapin* v. *Chicopee Universalist Society*, 8 Gray, 580. *Austin* v. *Shaw*, 10 Allen, 552.

The ruling that the plaintiff in review could not recover was correct. *Exceptions overruled.*

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ALBERT H. HEWS & another *vs.* ATLAS INSURANCE COMPANY.

Suffolk. March 6.—7, 1879. MORTON & ENDICOTT, JJ., absent.

A policy of insurance insured the plaintiff as follows: "$500 on brick pottery building and ells, three stories with basement and flat roof. $500 on machinery, shafting, belting, machines, tools and all implements used by him in his business. $950 on stock in trade consisting principally of earthen-ware and on materials for manufacturing the same. $50 on office furniture, including safe, contained in said building, situate on D. Street, near the F. Railroad in N." In an action thereon it appeared that the plaintiff was a manufacturer of earthen-ware in N.; that, at the date of the policy in suit and of the fire which occasioned the loss sued for, his manufactory consisted of two three-story brick buildings connected by a corridor; that one building was generally known as the pottery, and had three ells attached, one of which was used as the office; that the other building was generally known as the storehouse; that the pottery building contained the engines and most of the machinery, and was chiefly used for the manufacture of earthen-ware, though to some extent also for storage; that the storehouse building was chiefly used for storing manufactured ware, though certain of the processes of manufacture were conducted there, and a limited amount of machinery and implements was contained therein; that in the course of manufacture almost all the stock went to and fro from each of the buildings to the other several times; and that by the fire the storehouse and its contents were totally destroyed, and the pottery building injured to a certain extent, but its contents were not damaged by fire. *Held*, that the words of the policy "contained in said building, situate on D. Street," &c. applied to the machinery and stock, as well as to the furniture; and that nothing was covered by the policy but the "pottery building" and its contents.

CONTRACT on a policy of insurance for $2000, dated March 5, 1875, by which the defendant insured the plaintiffs for the term of one year, as follows:

"$500 on their brick pottery building and ells, three stories with basement and flat roof. $500 on machinery, shafting, belting, machines, tools and all implements used by them in their business. $950 on stock in trade consisting principally of earthen-ware and on materials for manufacturing the same. $50 on office furniture, including safe, contained in said building, situate on Dwight Street, near the Fitchburg Railroad in North Cambridge, Mass."

At the trial in the Superior Court, before *Colburn*, J., it appeared that the plaintiffs were large manufacturers of earthen-ware in North Cambridge; that at the date of the policy in suit and of the fire, which occurred on June 11, 1875, their manufactory consisted of two large three-story brick buildings, con-

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nected by a three-story wooden corridor six feet wide and fifteen feet long; that one building was generally known as the pottery, and had three ells attached, one of which was used as the office; that the other building was generally known as the storehouse; that the pottery building contained the engines and most of the machinery, and was chiefly used for the manufacture of earthen ware, though to some extent also for storage; that the storehouse building was chiefly used for storing manufactured ware, though certain of the processes of manufacture were conducted there, and a limited amount of machinery and implements were contained therein; that in the course of manufacture almost all the stock went to and fro from each of the buildings to the other several times; that by the fire the storehouse and its contents were totally destroyed, and the pottery building injured, but its contents were not damaged by fire; that the plaintiffs had a prior policy in the defendant company identical with the one in suit, for the year ending March 5, 1875; and that, during its pendency, the general agent of the defendant company, under whose authority the policy in suit issued, had examined the premises and the course of manufacture therein. The plaintiffs claimed a loss of $10.55 on the first item named in the policy, $134.25 on the second item, and $950 on the third item.

The plaintiffs were insured by policies for $2000 each, in each of three other companies, substantially for the same items and amounts as in the defendant company. They had also $4000 insurance in two other companies specifically on the stock in the storehouse, and $7000 in two other companies specifically on the pottery building, and $6000 specifically on the storehouse building.

Upon these facts, the defendant admitted its liability for the first item, but contended that the terms of the policy only applied to the machinery and stock contained in the pottery building. The plaintiffs contended that, under the facts proved, the clauses of the policy relating to stock and machinery were not so limited, but applied to stock or machinery in either of the buildings. But the judge ruled otherwise; and directed a verdict for the plaintiffs for the first item only. The plaintiffs alleged exceptions.

J. Willard, for the plaintiffs.

C. Allen & J. Fox, for the defendant, were not called upon.

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BY THE COURT. It is manifest, on the face of the policy that the words "contained in said building, situate on Dwight Street," &c., inserted at the end of the description of the subjects of insurance, apply to the machinery and the stock, as well as to the furniture; and that nothing is covered by the policy, but the "pottery building" and its contents. The plaintiffs' own bill of exceptions admits that the storehouse was not a part of this, but a distinct building. *Exceptions overruled.*

JOHN W. BOWSER *vs.* HOMER WELLINGTON.

Suffolk. March 7, 1879. MORTON & ENDICOTT, JJ., absent.

In an action for personal injuries occasioned to the plaintiff in being run over, while crossing a street, by a horse and wagon coming behind him from another street, the fact that the plaintiff does not show that he looked up and down the street before crossing is not conclusive evidence, as matter of law, that he was not in the exercise of due care.

TORT for personal injuries occasioned to the plaintiff in being run over by a horse and wagon driven by the defendant, while crossing Devonshire Street in Boston. Answer, a general denial.

At the trial in this court, before *Soule*, J., the plaintiff testified that he was about sixty-four years old; that he was on his way to Faneuil Hall Market about eleven o'clock in the forenoon; that he walked down Cornhill across Washington Street, and kept along the sidewalk to Devonshire Street; that he had taken, perhaps, four steps in crossing Devonshire Street when he was suddenly struck down from behind by a horse and wagon driven by the defendant; that he did not see the horse and wagon approaching, nor hear them; that they appeared to be moving with great swiftness, as he inferred from the violence with which he was struck; that he thought the horse or shaft struck him first, as the horse swung around the corner; and that the wagon made no noise, because the street had been recently covered.

Flora S. Russell testified that she saw the accident; that she

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was walking down Cornhill, a short distance behind the plaintiff, and on the same sidewalk with him, and was about to cross Devonshire Street when the accident occurred; that the plaintiff was walking in the ordinary way in which any person would walk; and that all she could say was that a horse and wagon came very rapidly and ran over the plaintiff before he was half across the street, but she could not say where they came from.

The defendant testified that he drove slowly down Brattle Street, across Cornhill, and slackened his speed to a walk; that he saw the plaintiff crossing the street some twenty feet before he reached him; that he thought there was room to pass behind him, and should have succeeded in doing so, but the plaintiff staggered back against his horse, striking the horse about midway the length of his body; and that there was no vehicle or horse between his horse and the plaintiff after he first saw the plaintiff.

There was no evidence as to whether the plaintiff looked up or down the street before or while crossing. There was contradictory evidence as to whether the plaintiff was intoxicated, or not, at the time of the accident, and staggered back.

This was all the evidence on the question whether the plaintiff used due care; and the defendant asked the judge to rule that there was no evidence which would warrant the jury in finding that the plaintiff was in the exercise of due care. But the judge declined so to rule; and submitted the case to the jury, under instructions not excepted to.

The jury returned a verdict for the plaintiff for $3000; and the defendant alleged exceptions to the refusal to rule as requested.

H. N. Sheldon, for the defendant, cited *Gahagan* v. *Boston & Lowell Railroad*, 1 Allen, 187; *Butterfield* v. *Western Railroad*, 10 Allen, 532; *Crafts* v. *Boston*, 109 Mass. 519; *Deyo* v. *New York Central Railroad*, 34 N. Y. 9.

A. A. Ranney, for the plaintiff, was not called upon.

By the Court. The decisions as to the degree of care required at a railroad crossing are not applicable to this case. *Lynam* v. *Union Railway*, 114 Mass. 83. It was for the jury to judge whether the plaintiff should have looked behind him when crossing the street, and whether, under all the circumstances, he used proper care. *Schienfeldt* v. *Norris*, 115 Mass. 17.

Exceptions overruled.

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JOHN J. KELLER *vs.* ROBERT WEBB & another.

Suffolk. March 10.—11, 1879. MORTON & ENDICOTT, JJ., absent.

In an action on a written contract for the purchase of a certain number of casks of a particular kind of black lead at a certain price per pound, oral evidence that the casks were to contain "pure lump lead" is inadmissible.

In an action on a written contract for the purchase of a certain number of casks of black lead to be delivered "in shipments of 100 casks per month," the declaration alleged that the lead was "to be delivered in lots of about 100 casks at different times in the year 1877." *Held*, that there was a variance between the declaration and the proof as to the description of the contract; but that the plaintiff might amend, after verdict in his favor, taking no costs since the trial.

CONTRACT for breach of an agreement to purchase certain black lead. The plaintiff in his declaration alleged that "he made a contract in writing with the defendants, the substance and legal effect of which was that he sold to the defendants and the defendants purchased of him 600 casks of Crown double hammer No. 1 Amalia Mine German black lead, to be delivered in lots of about 100 casks at different times in the year 1877."

After the former decision, reported 125 Mass. 88, the case was tried in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The following letter from the plaintiff to the defendants was in evidence: "When we had the pleasure of your visit a short time since, you stated that you would report, on your return to Boston, in regard to the contract for about 600 casks of Crown double hammer No. 1 Amalia Mine German black lead, for next year. According to last quotations, we could import the lead at $1.70 gold per 100 lbs. in shipments of 100 casks per month (probably from the 1st April next), payable in cash 30 days after arrival of each lot."

The defendants' letter of acceptance was as follows: "Your esteemed favor of the 23d inst. is at hand and contents noted. We should like to make the contract for the 600 casks, Crown double hammer No. 1 Amalia Mine German black lead, at $1.70 gold per 100 pounds."

The defendants objected to this contract, when offered in evi

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dence, on the ground that there was variance between it and the declaration. But the judge ruled that there was no variance, and admitted the evidence.

There was contradictory evidence as to whether black lead is usually imported in casks of from 600 to 900 pounds each, or in casks of from 800 to 900 pounds each. Casks generally contain from 50 to 75 pounds of dust, which arises entirely from the attrition of the lumps in the transportation from Germany; and the plaintiff testified that they might contain much more dust than this if the dust were pure, and still answer the description in the contract. One of the defendants testified that the casks which he received contained on the average 233 pounds of dust, which contained an admixture of grit, and that upon this, among other grounds, he refused to accept it; and contended that, at the making of the contract at the visit to the plaintiff referred to in the first letter above quoted, he bargained with the plaintiff for lump lead; and his counsel proposed to ask him the following question: "At the time of the making of the agreement, was anything said between you and the plaintiff about your having pure lump lead in the casks?" But the judge refused to allow this question to be put, as having a tendency to vary the written contract; and the defendants excepted. At the same time the judge offered to allow the defendants' counsel to ask the witness whether the lead was in fact Crown double hammer No. 1 Amalia Mine German black lead, that is, the lead described in the contract; and thereupon the defendants' counsel, not waiving his exception to the above refusal, put this question to the witness, and he answered that it was not.

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

J. D. Thomson, for the defendants.

S. J. Thomas, for the plaintiff.

GRAY, C. J. The question proposed by the defendants was rightly excluded, because it sought not only to add to, but to alter, the written contract by parol evidence.

As to the description of the contract, there was a variance between the declaration and the proof; but, as the merits of the case appear to have been fully tried, that variance may and should be allowed to be cured after verdict, by an amendment

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of the declaration, the plaintiff taking no costs since the trial. *Cleaves* v. *Lord*, 8 Gray, 66. *Stone* v. *White*, 8 Gray, 589. *Peck* v. *Waters*, 104 Mass. 345.

Upon such amendment, exceptions overruled.

CHARLES A. PETERSON *vs.* GEORGE A. PATRICK.

Suffolk. March 7.—18, 1879. MORTON & ENDICOTT, JJ., absent.

In an action on a note, to which the defence was payment, it appeared that the note was secured by a mortgage of a chattel. The defendant testified that he had made part payments on the note, and that the plaintiff had taken the chattel and had admitted selling it for a certain sum; and put in evidence of its value. The jury were instructed to find for the defendant, if, by the part payments and the value of the chattel, the note was paid. The jury returned a verdict for the plaintiff for a sum less than the value of the chattel according to the defendant's evidence, and stated in the verdict that they left out of their estimate the value of the chattel. *Held*, that the defendant was entitled to a new trial.

CONTRACT on a promissory note dated February 24, 1872, for $210. Answer, payment. Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions, in substance as follows:

The signature of the note was admitted; and it appeared that it had been secured by a mortgage of a piano and other chattels, containing a power of sale. The defendant, who was the only witness called, testified that he had made several cash payments to the plaintiff on the note, and that the plaintiff had taken from him the piano on the mortgage, but had not reported to the defendant any sale of the same, or in any way accounted for the proceeds or value thereof; and he testified to the cost of the piano when purchased by him, and stated how much the same had been used, and that the plaintiff had admitted making a sale thereof, and had also admitted that he had disposed of the piano in a barter trade for a specific sum named, greater than the verdict rendered; and that the defendant did not know where the piano was, or who had it.

The judge instructed the jury "that, after ascertaining the amount due on the note, they should ascertain the amount of the

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cash payments which they might be satisfied upon the evidence had been made, and, if such amount of payments was not sufficient to extinguish the note, they should then ascertain the value of the piano upon the evidence before them, and apply that, if they found that the plaintiff had taken the piano and used it as his own property, to the further extinguishment of the note, and if, by both cash payments and the value of the piano, the note was fully paid, they should find for the defendant; but, if otherwise, they should find for the plaintiff for the balance remaining due thereon."

The jury returned a verdict, which, as ordered by the court to be recorded, was as follows: "In suit Charles A. Peterson *vs.* George A. Patrick to recover value of mortgage note given under date February 24, 1872, for two hundred and ten dollars, they leave out of their estimate the value of the piano, one of the articles held under said mortgage. The jury find for the plaintiff and assess damages in the sum of one hundred seventy-eight and $\frac{86}{100}$ dollars."

The defendant moved to set aside this verdict, as irregular, and contrary to the evidence and to the instructions of the court. The judge overruled the motion, intimating, however, that he would be willing to grant a new trial so far as to determine the value of the piano. The defendant contended that the whole verdict was irregular, and excepted to the order of the judge overruling his motion.

G. W. Park & G. F. Piper, for the defendant, cited *Patterson* v. *United States*, 2 Wheat. 221; *Jones* v. *Kennedy*, 11 Pick. 125; *Laflin* v. *Brown*, 7 Met. 576; *Brown* v. *Dean*, 123 Mass. 254.

D. F. Fitz, for the plaintiff. The statement added by the jury is consistent with their verdict; it was mere surplusage and no part of the verdict; and shows that they did not believe the defendant.

By the Court. The verdict is ambiguous, because it does not show whether the jury determined that the value of the piano should not be deducted from the amount of the note, or made no decision at all upon that question. The court below erred in ordering a verdict in so irregular and indefinite a form to be recorded.

Exceptions sustained, and verdict set aside.

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GREENWOOD C. ARNOLD *vs.* SAMUEL NASH.

Suffolk. March 7.—18, 1879. MORTON & ENDICOTT, JJ., absent.

If a lessee has obtained peaceable entry and possession of a building previously occupied as a grocery, by a tenant at will of the lessor, and any notice to the tenant is necessary, two days is a reasonable time for such notice, in the absence of evidence to the contrary.

TORT for breaking and entering the plaintiff's close, and removing the plaintiff's goods therefrom, and for an assault.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff offered evidence tending to show that he had been in the occupancy of a grocery on Warren Street in Boston for some four years, the latter portion of the time without any written lease, being a tenant at will, and paying his rent monthly; that on Saturday, November 24, 1877, the defendant attached certain goods in the store, which were the property of one Hayes, and put in a keeper; that he kept the keeper in the store until December 6, 1877, at which time the goods were sold by auction; that, on the Tuesday after the attachment, the plaintiff got into the store through an unfastened door, during the temporary absence of the keeper, and fastened up the door again; that the keeper returned, broke out a light, and got in; that, on December 3, the plaintiff ordered the keeper out again, and proceeded to lock up the front door while the keeper was inside; that the keeper sent for the defendant, who came, broke into the store again, unfastened the front door, and with the help of the keeper put the plaintiff out.

The defendant offered evidence tending to show that, prior to the time when he put the keeper in the store, the owner of the premises had executed to one Gallagher a written lease thereof for a term of years, dated November 1, 1877, and to take effect immediately; that on Thursday, November 22, 1877, two days before the attachment referred to, he served a notice upon the plaintiff that his tenancy was terminated by the written lease, and requesting him to leave the premises; that, on the day of the attachment, he went to the premises with one Dennis, with a written authority from Gallagher to enter and take possession of the premises and hold them for him, as his agent, under his

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lease; that he read the authority to the plaintiff, and showed him the lease, but would not say that he read the lease to him; that he then, in the presence of the plaintiff, requested Dennis to take and hold possession of the premises for Gallagher; that he then proceeded to make the attachment, and appointed Dennis as keeper of the goods attached; and that no opposition was made to these proceedings by the plaintiff. There was no evidence that the plaintiff had any notice of the written lease before Thursday. All this evidence, as to the taking possession and giving notice, was denied by the plaintiff.

The judge instructed the jury that, if they found that the defendant obtained peaceable possession of the premises before he made the attachment, the plaintiff could not recover, because the premises were no longer the premises of the plaintiff, his tenancy being terminated; but if he did not thus obtain possession, the defendant had kept his keeper in the premises an unreasonable time and was a trespasser *ab initio*, and responsible for such entry and all injury to the building and all his subsequent acts. To this ruling no exception was taken.

The plaintiff then contended, that, if the tenancy was thus terminated, he should have had reasonable notice of the intended entry upon the premises; and that a notice given on the Thursday previous was not sufficient. The judge stated that, if the defendant obtained peaceable entry and possession on Saturday, he did not think it was affected by a want of previous notice; but as there was evidence of a previous notice given on Thursday, he should rule, for the purposes of the trial, that a notice was necessary; and further ruled, that, if the jury found that the defendant gave the notice which he claimed he had given on the previous Thursday, that notice, as matter of law, was reasonable notice.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

B. F. Briggs, for the plaintiff.

C. T. Gallagher, for the defendant.

By the Court. The only ruling excepted to is that, assuming, as matter of fact, that the defendant obtained peaceable entry and possession on Saturday, and, as matter of law, that previous notice was necessary, then, as matter of law, two days

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was a reasonable time for such notice; and the bill of exceptions states no facts having any tendency to show that the ruling, as applicable to the circumstances of this case, was erroneous. *Pratt* v. *Farrar*, 10 Allen, 519. *Exceptions overruled.*

WILLIAM C. MANSON *vs.* GREENWOOD C. ARNOLD.

Suffolk. March 7. — 26, 1879. AMES & ENDICOTT, JJ., absent.

An answer to an action on an account annexed for use and occupation, which denies each and every allegation in the plaintiff's writ and declaration contained, puts in issue the matters alleged in the declaration.

If a declaration in set-off is seasonably filed in an inferior court, and is transmitted with the other papers in the case to the Superior Court on appeal, it need not be filed anew in the latter court in order to warrant the admission of evidence in support of it.

CONTRACT on an account annexed for use and occupation of a building. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The action was brought originally in the Municipal Court of Boston, and the declaration was duly filed with the entry of the writ. The defendant appeared and answered orally, and afterwards filed in that court a declaration in set-off for more than the amount of the plaintiff's claim. To the declaration in set-off, no answer in writing was filed by the plaintiff. At the trial the set-off was disallowed, and judgment was entered for the plaintiff for the amount claimed.

The defendant appealed, and duly entered the appeal at January term 1878 of the Superior Court, and the papers filed in the Municipal Court were transferred to the files of the Superior Court. On the return day of the term, the defendant appeared and filed the following answer: "And now comes the defendant, and, without waiving any of his rights under his motion to dismiss or plea to the jurisdiction, denies each and every allegation in the plaintiff's writ and declaration contained." But the defendant did not file in the Superior Court a declaration in set-off.

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The plaintiff asked the judge to rule: "1. That the defendant's answer was insufficient in form to join issue on an action on the common count for use and occupation, as declared on by the plaintiff. 2. That the defendant had filed no set-off to the plaintiff's claim in the Superior Court, and should not be allowed to present any evidence of the matters alleged in set-off until such set-off had been filed by him in that court." The judge refused so to rule, and admitted evidence under the defendant's answer and declaration in set-off. Afterwards, by order of the court, the plaintiff filed an answer to the declaration in set-off.

The jury returned a verdict for the defendant on his declaration in set-off; and the plaintiff alleged exceptions.

C. T. Gallagher, for the plaintiff.

B. F. Briggs, for the defendant.

GRAY, C. J. The answer filed in the Superior Court put in issue the matters alleged in the declaration. *Warren* v. *Ferdinand*, 9 Allen, 357. The declaration in set-off had been seasonably filed in the Municipal Court; St. 1870, *c.* 330, § 3; and, having been transmitted with the other papers in the case to the Superior Court on the appeal, was already on file in that court, and need not be filed there anew, in order to warrant the admission of evidence in support of it. Gen. Sts. *c.* 120, §§ 27, 28. Sts. 1862, *c.* 217, § 1; 1866, *c.* 279, § 2. *Wilbur* v. *Taber*, 9 Gray, 361. *Lew* v. *Lowell*, 6 Allen, 25. *Higby* v. *Upton*, 3 Met. 409, 411. *Exceptions overruled.*

JOHN BRENNER *vs.* FRANCIS DUARD.

Suffolk. March 17. — 26, 1879. AMES & LORD, JJ., absent.

In an action for the conversion of personal property, on the issue whether the plaintiff's claim was founded on the fraud of the defendant, so as not to be affected by his discharge in bankruptcy, the judge found that the defendant took the property in question from the plaintiff's store during the absence of the latter, under a claim of right which he honestly entertained; and that there was in fact no fraud on the part of the defendant. *Held*, that the judge rightly refused to rule that, as matter of law, there was a fraudulent taking by the defendant.

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TORT for the conversion of certain personal property. Writ dated June 14, 1869, and returnable to the July term 1869 of the Superior Court. The defendant was defaulted, and damages were assessed. Upon a suggestion of the defendant's bankruptcy, the case was continued. On June 24, 1878, the defendant pleaded his discharge in bankruptcy, and the plaintiff filed a replication alleging that his claim was founded on the fraud of the defendant, and was not affected by the discharge.

At the trial, without a jury, *Putnam*, J., found the following facts, upon the evidence offered as to the original taking: The defendant claimed to be the owner of the property in question, and the title and ownership were in dispute between the parties when this action was first brought. The defendant notified the plaintiff, four days before the taking, that, if a certain claim which he had against the plaintiff was not paid, he should take possession of the property; and the plaintiff answered that he should not pay it. On June 9, 1869, about four o'clock in the morning, the defendant went with a horse and wagon, and ten other persons to assist him, to the plaintiff's store, in the absence of the plaintiff. They went to a door in a side entrance, which was fastened by a padlock, not locked but only hitched into the staple and shut; they took the padlock out of the staple, opened the door and went in; they then slipped back the bolt of the front door on the inside, the door being fastened only by a bolt, opened it from the inside, and through this front door and the side door removed the property in question and carried it away. No door was broken, and no other force used to the door or building, except that with a crowbar the defendant loosened some bricks about a range, which was one of the articles taken away by the defendant. No question was made but that the defendant took the property under a claim of right which he honestly entertained.

Upon these facts, the plaintiff asked the judge to rule that the taking by the defendant was a fraudulent taking; and that the defendant's discharge in bankruptcy was not a bar to this action, because the claim of the plaintiff was a debt created by the fraud of the defendant.

The judge declined so to rule; found that the taking was not a fraudulent taking within the meaning of the bankrupt act,

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and that the plaintiff's claim was not one created by fraud; ruled that the discharge was a bar; and found for the defendant. The plaintiff alleged exceptions.

C. F. Donnelly & J. W. O'Brien, for the plaintiff.

N. B. Bryant, for the defendant.

BY THE COURT. The judge, before whom this case was tried without a jury, appears to have found that there was in fact no fraud on the part of the defendant, and rightly refused to rule that there was a fraudulent taking as matter of law.

Exceptions overruled.

HENRY PFAFF & another *vs.* JOHN GOLDEN, Jr.

Suffolk. March 6. — 27, 1879. MORTON & ENDICOTT, JJ., absent.

The assignment of a lease by the lessor entitles the assignee to sue the lessee in his own name on the covenants in the lease; and an assignment by the lessee of his right, title and interest in the lease does not exempt him from liability on his covenant to pay rent, although the assignee of the lessor assents to the latter assignment.

CONTRACT on a written lease, executed by G. R. Reichart and Katherine Reichart as lessors, and by the defendant as lessee, for the term of five years from February 1, 1874, the rent to be paid in equal monthly instalments, and containing the covenants that the lessee, his executors, administrators and assigns, would pay the rent in the manner stipulated, and that they would not, without the consent in writing of the lessors, their heirs or assigns, assign the lease, nor underlet the whole or any part of the premises.

The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court on appeal, on agreed facts in substance as follows:

The defendant entered into possession of the demised premises under the lease, and paid the monthly rent to the lessors up to December 1, 1875. The plaintiffs were the holders of an outstanding mortgage upon the demised premises, under which

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they took possession for the purpose of foreclosure on November 16, 1875, and on the same day took an assignment in writing, under seal, from the lessors, of the lease, and a quitclaim deed of the premises was executed by the lessors and delivered to the plaintiffs on February 10, 1876. The defendant paid the rent for the month of November, 1875, to the plaintiffs, and on January 14, 1876, signed and sealed the following instrument, on the back of the lease: "In consideration of one dollar to me paid by Louis Lewisson of Boston, in the county of Suffolk, and State of Massachusetts, the receipt whereof is hereby acknowledged, I do hereby transfer and set over the within lease and all my right, title and interest therein for the remainder of the term of said lease. To have and hold the same to said Lewisson from the date hereof." On February 8, 1876, the plaintiffs indorsed on the lease their consent to the assignment.

If the plaintiffs could maintain this action, judgment was to be entered for them in the sum of $616.89, with interest.

The Superior Court ordered judgment for the plaintiffs for $656.99; and the defendant appealed to this court.

D. E. Richardson & J. M. Browne, for the defendant.

A. Russ & D. A. Dorr, for the plaintiffs.

By the Court. The assignment, from the lessors to the plaintiffs, of the lease to the defendant, entitled them to sue him in their own names upon his covenants in the lease. *Hunt* v. *Thompson*, 2 Allen, 341. The assignment from him did not exempt him from liability on that covenant. *Way* v. *Reed*, 6 Allen, 364. *Judgment affirmed.*

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JOSEPH M. KEENING *vs.* CHARLES H. AYLING.

Suffolk. March 24. — 27, 1879. AMES & LORD, JJ., absent.

A deed of a lot of land described it as bounded on two sides by streets, on the third side by a passageway, and on the fourth side by another lot. The conveyance was subject to a condition that the front line of the building should be a certain distance from, and parallel to, one of the streets, which was named; and also a condition that no dwelling-house or other building except the necessary out-buildings should be erected on the rear of the lot. At the time the deed was executed there were certain buildings on the land, and the deed stated that the buildings then on the land conformed with the conditions. *Held*, that there was no ambiguity as to what portion was to be deemed the rear of the lot.

A deed of a lot of land contained the condition that "no buildings which may be erected on said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for the term of twenty years" from a certain day. *Held*, that the limitation of time applied only to the mode of use and occupation; and not to the height of the buildings or the materials of the outer walls.

BILL IN EQUITY for the specific performance of an agreement in writing, dated August 21, 1878, whereby the defendant agreed to sell and the plaintiff to purchase a parcel of land in Boston for the sum of $9000; the land to be conveyed within ten days from date "by a good and sufficient warranty deed, conveying a good and clear title to the same, free from all incumbrances." Hearing before *Ames*, J., who reported the case for the determination of the full court, as follows:

In 1862, the city of Boston conveyed the land in question to Mary Ann Carter, by a deed which described the land as bounded easterly on Newton Street 17.85 feet; northerly by another lot 84 feet; westerly, by a passageway ten feet wide 25.84 feet; southerly by Harrison Avenue 84.44 feet. The deed declared that the land was conveyed subject to certain conditions, of which only the following need now be stated: "2. The front line of the building which may be erected on the said lot shall be placed on a line parallel with and ten feet back from the said Newton Street. 4. No dwelling-house or other building except the necessary out-buildings shall be erected or placed on the rear of the said lot. 5. No buildings which may

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be erected on the said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for the term of twenty years from the first day of April 1859." The deed also contained the following clause: "The buildings now standing on the said land conform with the requirements of the foregoing conditions."

On January 14, 1874, the defendant became the owner of the land through various mesne conveyances, none of which referred to the conditions set forth in the deed to Carter.

The deed to Carter also referred to a plan, which showed nine other lots adjoining and adjacent to that conveyed to Carter. All of these lots were owned by the city of Boston, and sold and conveyed by the city by deeds, each of which contains the same conditions, expressed in the same words; but makes no reference to the other deeds. Deeds of five of the lots were dated on the same day; and all of the lots, except two, were so conveyed by deeds made and recorded prior to the deed to Carter, and the houses now upon these lots are the same which were originally built, and conform to the conditions. All the lots are occupied by dwelling-houses.

The city of Boston was applied to by the respondent for a release of said conditions, but the owners of the adjoining lots objected, and the city refused to give a release.

The defendant refused to perform his agreement, because he could not obtain a release of the conditions, and would not give a warranty deed of the premises, and so informed the plaintiff.

The plaintiff contended that the defendant should be decreed to perform, so far as it was in his power to do so, and that there should be an abatement of the purchase price by way of compensation for the injury to the value of the estate, in consequence of the existence of any such restrictions, conditions or reservations.

The case was referred to a master to report, if it should appear that the real estate described in the bill was subject to any valid conditions, restrictions or reservations, whether there was any injury to the estate by reason of the existence of such conditions.

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reservations or restrictions, and the extent of the injury by reason thereof. The master found and reported that there was injury to the estate as to its value, by reason of the existence of certain of the conditions or restrictions; that the injury by reason of the existence of condition No. 2 was $100; that the injury by reason of the existence of condition No. 4 was $350; that the injury by reason of the existence of so much of condition No. 5 as relates to the occupation of the premises as a dwelling-house was $25; that the injury by reason of the existence of so much of condition No. 5 as relates to the building being not less than three stories high, exclusive of basement and attic, was $200; that, as to the remaining conditions, no injury to the estate resulted from them or either of them.

The master's report was not excepted to by either party; and it was agreed that a decree for specific performance might be entered, and the purchase price abated by the amount of the damages so found and reported by the master, provided the conditions, restrictions or reservations were valid; and that if any one or more of the conditions, restrictions or reservations were invalid, the damages found by the master were to be rejected to that extent.

The judge reserved the question of the validity and effect of the conditions, reservations and restrictions, and the rights of the parties as affected thereby, for the consideration of the full court; such judgment to be rendered as law and equity might require.

J. A. Maxwell, for the plaintiff.

S. W. Creech, Jr., for the defendant.

GRAY, C. J. The deed itself shows that the front of the lot is on Newton Street, and the rear on the passageway at the opposite end of the lot, and that buildings conforming to the conditions of the deed were already standing on the land; and there is nothing in the report before us to show that, as applied to the facts of this case, there is any ambiguity as to what proportion is to be deemed "the rear of the said lot," upon which the fourth condition requires that "no dwelling-house or other building, except the necessary out-buildings, shall be erected or placed."

We can have no doubt that the words "for the term of

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twenty years from the first day of April, 1859," at the end of the fifth condition, apply only to the mode of use and occupation, and not to the height of buildings or the materials of outer walls.

According to the agreement of the parties and the terms of the report, a decree is to be entered for specific performance, and for the damages assessed by the master, except those for the existence of the second condition, all claim for which was waived by the plaintiff at the argument.

Decree for the plaintiff accordingly.

NATHANIEL HAMILTON *vs.* BOSTON PORT & SEAMEN'S AID SOCIETY.

Suffolk. March 27. — 28, 1879. AMES & LORD, JJ., absent.

In an action for money lent to a benevolent society by its superintendent, the plaintiff put in evidence the report of an auditor in his favor, which stated that the plaintiff had general charge of the receipts and expenditures of the society, and rendered his accounts at stated intervals; that in his accounts he charged himself not only with money actually received, but also with accounts due the society which he considered good and expected to collect; and that, to make good the deficiency, he lent the society money from time to time; that the board of managers did not authorize the plaintiff to do so, but that there was no vote of the board forbidding it; that, at each time the accounts were settled, the plaintiff was asked whether that was his whole account, and he answered that it was. The defendant put in evidence several receipts of the defendant, given during the time covered by his account, acknowledging the receipt of sums of money of the society for money expended by the plaintiff for the society, the aggregate of which was larger than the amount sued for, but which contained no mention of money lent. Only one of these receipts was in evidence at the hearing before the auditor. The auditor's report and these receipts were the only evidence in the case. *Held*, that the judge rightly refused to rule, as matter of law, that the plaintiff was entitled to recover.

CONTRACT upon an account annexed for money lent from September 1874 to January 1876. The case was referred to an auditor, who reported the following facts:

The defendant corporation is a benevolent society, its object being to provide a good home for seamen while on shore, in a house owned by the society, and called the Seamen's Home, and

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in connection with this house there is a store, from which seamen are furnished with outfits and infits, and a place for religious worship, called the Bethel Church. The plaintiff, since the organization of the defendant in 1867, had been superintendent of the house and store, and had charge of the Bethel, for which service he received the sum of $1000 a year, and the support of himself and family. The society was managed by a board of managers. The plaintiff, as superintendent, had the general charge of the receipts and expenditures of the society, and, after the year 1871, settled with the board of managers the store account once each month, and the house account once every three months. It was the custom of the plaintiff, when he rendered his accounts to the board of managers for their inspection, to charge himself with the total amount of the money received by him for the society, and also with certain sums due the society for board, &c., and which was not paid at the time he rendered his accounts, but which he considered good, and expected to collect, he not informing the board of managers that there was a certain portion of this amount that was not then collected. In this account he credited himself with the amounts paid out by him for the society, a balance was struck, and a settlement made upon the above basis. Sundry of the items which the plaintiff, in his accounts, had charged to himself as cash paid, never, in fact, were paid to him, and, to make this deficiency good, he, from time to time, lent the society sundry sums of money in anticipation of collections of the amounts advanced.

In the year 1871 the plaintiff had trouble with the defendant, growing out of a deficit in his accounts, not arising, however, from any malfeasance of the plaintiff; and the deficit was made good by the defendant. The president of the defendant corporation called the plaintiff before him and told him there was trouble in his accounts, that it must never occur again, and that he was to make no more advances. The plaintiff promised him that it should not happen again. At this interview, and in the presence of the plaintiff, the president instructed the assistant treasurer of the corporation to ask the plaintiff every month, at the time he made his settlements with the corporation, "Is that your whole account?" "Is that all?" "Is there anything back of

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this?" At every settlement after the interview in 1871, the assistant treasurer, or some one of the managers, acting for the assistant treasurer in her absence, asked the plaintiff these questions, when he presented his account for settlement. To which he replied, "This is all." The board of managers never authorized the plaintiff to borrow or lend money or make any advances in their behalf. There was no vote of the board of managers forbidding the plaintiff from advancing money to meet any deficit of money in the settlements made by the plaintiff. In January 1876 the plaintiff resigned his office of superintendent, to take effect on April 1 following.

The auditor found for the plaintiff, in the sum of $613 and interest, for money lent by him to the defendant.

At the trial in the Superior Court, before *Putnam*, J., without a jury, the plaintiff rested upon the auditor's report. The defendant put in evidence four receipts signed by the plaintiff, acknowledging the receipt of certain sums from the defendant, as follows: The first, dated January 1, 1875, of $200, "towards paying the amount given to destitute shipwrecked seamen, during the year 1874." The second, dated July 19, 1875, of $250, "for relief given to seamen in clothing and subsistence, to July 1, 1875." The third, dated October 15, 1875, of $410.60, "for the aid and support of seamen, given in board and clothing from July 1, to September 30, 1875." The fourth, dated January 1, 1876, was in the form of an account, showing the amount paid by the plaintiff "for provisions, groceries, coal and hired help to date," and the amount received by him "for board during the quarter from October 1," showing a balance due the plaintiff of $295.46. This account was signed by the plaintiff, with the word "paid" opposite his name. This last receipt was put in evidence at the hearing before the auditor. There was no other evidence in the case.

On this evidence, the plaintiff contended that, as matter of law, the judge must find for the plaintiff in the same amount which the auditor found. The judge declined so to do, and, upon the facts found by the auditor and the other evidence, found for the defendant; and, at the request of the parties, reported the case for the consideration of this court. If the judge, as matter of law, ought to have found as contended by

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the plaintiff, judgment was to be entered for the plaintiff for the sum found by the auditor; otherwise, judgment for the defendant.

A. Hemenway, for the plaintiff.

R. D. Smith, for the defendant.

BY THE COURT. The judge by whom the case was tried had the same power as a jury, and, upon the particular facts stated in the auditor's report and the additional evidence, was not required, as matter of law, to reach the same general conclusion as the auditor, but was warranted in finding that the plaintiff never in fact lent the money sought to be recovered in this action. *Blackington* v. *Johnson*, *ante*, 21.

Judgment for the defendant.

EDWIN A. COOK *vs.* MARK GOOGINS.

Suffolk. March 27. — 28, 1879. AMES & LORD, JJ., absent.

The St. of 1874, c. 404, providing that "all persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers," does not apply to a note made before the passage of the statute.

CONTRACT upon a promissory note, dated January 28, 1874, payable eighteen months from date to the order of the plaintiff, and signed by Albert A. Cole. The defendant's name was on the back of the note. Writ dated February 16, 1878. Answer, want of demand and notice.

At the trial in the Superior Court, before *Aldrich*, J., without a jury, the plaintiff offered the note in evidence, and it was admitted that the defendant put his name upon the back of the note at its inception, and before its delivery to the payee, but there was no evidence of demand upon the maker, or notice of non-payment to the defendant.

The defendant asked the judge to rule that, under the St. of 1874, *c.* 404, without such evidence of demand and notice, the action could not be maintained. But the judge refused so to

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rule; and ruled that the above statute was prospective and not retroactive in its operation, and did not apply to a note given before the statute took effect; and ordered judgment for the plaintiff. The defendant alleged exceptions.

R. H. Thompson, for the defendant.

C. F. Loring, for the plaintiff, was not called upon.

By the Court. The St. of 1874, *c.* 404, which provides that "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof, the same as indorsers," cannot, consistently with settled rules of interpretation, be construed to require, or to have been intended to require, any additional act to fix a liability under a positive and unconditional contract made before its passage.

Exceptions overruled.

Henry Harnden & another *vs.* Selma E. Gould & trustee.

Middlesex. January 27. — March 4, 1879.

If a married woman carries on the business of keeping a boarding-house, and neglects to file the certificate required by the St. of 1862, *c.* 198, § 1, debts due to her for board are liable to attachment by the creditors of her husband.

The St. of 1862, *c.* 198, is not repealed by implication by the St. of 1874, *c.* 184.

Trustee Process. Writ dated July 13, 1878, and returnable to the First District Court of Eastern Middlesex. The case was submitted to the Superior Court, and to this court on appeal on an agreed statement of facts in substance as follows:

The defendant was defaulted. Thomas Appleton, summoned as trustee, answered that, at the time of service upon him, there were no goods, effects or credits of the defendant in his hands or possession. Subsequently, interrogatories were filed to the trustee, and he answered that he had boarded in the family of the defendant since April 1, 1878; that he contracted for such board with Nancy Gould, the wife of the defendant, and

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had made all payments to her; that, at the time of service of process upon him, he was owing for board the sum of $85.11; and that Nancy Gould had at various times, both before and after service of the writ, demanded of him the sum due. Nancy Gould appeared and claimed the funds in the hands of the trustee, as disclosed by his answers to the interrogatories filed.

The claimant, at the time the trustee boarded with her, was keeping a boarding-house, her husband and children living with her. The contract for such board was made with her, and both she and her husband treated the business of keeping boarders as her sole and separate business. No certificate had been filed by her, as required by the St. of 1862, *c.* 198, at the time of the service upon the trustee, and the plaintiff had no knowledge that the claimant was doing business on her separate account.

If, upon these facts, the claimant was entitled to the funds disclosed by the trustee, judgment was to be entered for the claimant, and the trustee discharged; otherwise, for the plaintiff, and the trustee to be charged.

The Superior Court found for the claimant, and ordered the trustee to be discharged; and the plaintiff appealed to this court.

S. Bancroft, for the plaintiff.

A. Cottrell, for the claimant.

MORTON, J. In *Dawes* v. *Rodier*, 125 Mass. 421, it was held that, if a married woman engages in the business of keeping a boarding-house, and neglects to file the certificate required by the St. of 1862, *c.* 198, the debts due to her for board are liable to attachment by the creditors of her husband. The question whether the St. of 1862, *c.* 198, was repealed by the St. of 1874, *c.* 184, was not raised in that case, but it is necessarily involved in the adjudication. This question is directly presented by the claimant in the case at bar, but we are of opinion that the ground taken by her cannot be maintained.

The St. of 1874 expressly repeals the St. of 1869, *c.* 409, § 1, and of 1868, *c.* 165, these statutes bearing upon subjects embraced within the purview of the repealing statute, but it contains no provision repealing the St. of 1862. As the St. of 1862 is not

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expressly repealed, the question is whether it is repealed by implication.

The later statute does not revise the whole subject embraced in the previous statutes. Its provisions are limited to the rights of a married woman to convey shares in corporations and real estate, to make contracts, to receive the wages of her work and labor, to sue, and to act as executrix, administratrix, guardian or trustee. It does not include the subject of her rights, liabilities and duties when she carries on business on her separate account. In other words, the later statute contains no provisions affecting the subject provided for in the St. of 1862. Full effect may be given to all its provisions consistently with the continued operation of the St. of 1862. It cannot therefore be held to repeal the previous statute by implication. *Gilson* v. *Emery*, 11 Gray, 480. *McQuade* v. *O'Neil*, 15 Gray, 52.

The necessary result is that, as the claimant failed to file the certificate required by the statute, the debt due to her by the trustee could be attached by a creditor of her husband.

Trustee charged.

W. S. HARROD *vs.* WALTER H. McDANIELS, administrator

Middlesex. Jan. 24. — March 10, 1879. AMES & SOULE, JJ., absent

In an action against A. as indorser of a promissory note, it appeared that B., acting as the attorney of A., signed the name of the latter on the back of the note in October 1874; that, in May 1874, A. gave B. a power of attorney, which authorized him to manage A.'s property during the absence of the latter from the United States and to sign notes; that, in August 1874, A. returned to the United States and was there when the note was executed; and that, in August 1875, A., with other creditors of the maker of the note in suit, who had then become bankrupt, signed an agreement of composition under seal and received a dividend on the note from the bankrupt's estate, and agreed to save the maker of the note harmless from liability upon such notes as were signed or indorsed by each of them, having been previously informed by B. that he had signed the same in the name of A. under the power of attorney; that, after the return of A., and before the note in suit was made, other notes were signed by B. as the attorney of A., with no other authority than he then possessed under the power, which were subsequently paid by A. *Held*, that there was sufficient evidence of a ratification of B.'s act.

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CONTRACT against the administrator of Maria L. Nesmith, upon a promissory note, dated October 5, 1874, payable to the order of the plaintiff, one year after date, signed by George T. Comins, and indorsed, before delivery to the payee, "M. L. Nesmith by Edward Hastings, attorney." Writ dated February 19, 1879. Trial in the Superior Court, before *Wilkinson*, J., who ordered a verdict for the defendant; and the plaintiff alleged exceptions, the material parts of which appear in the opinion.

D. S. Richardson & J. F. McEvoy, for the plaintiff.

T. H. Sweetser & G. A. A. Pevey, for the defendant.

COLT, J. The name of Maria L. Nesmith, the defendant's intestate, was signed to the note in suit by Hastings acting as her attorney in October 1874. In May 1873, she had given Hastings a power of attorney to collect and invest her money, to give notes in her name, to sell and convey personal property and real estate, and to prosecute and defend suits; with full power to manage all her estate, real and personal, during her absence from the United States. In August 1874, she returned from Europe to her residence in Lowell, where she remained until her death in 1876.

Assuming that the authority given by the power of attorney continued only during the absence of the principal from the United States, the question remains, whether the evidence offered by the plaintiff to show original authority or a subsequent ratification of Hastings's act in signing the note ought to have been submitted to the jury.

It was admitted that due notice of the non-payment of the note in suit was given to the intestate, Maria L. Nesmith. See St. 1874, *c.* 404. The plaintiff offered to prove that in August 1875, with other creditors of Comins, the principal maker of the note in suit, who had then become bankrupt, she signed an agreement of composition under seal, and received a dividend on the note from the bankrupt estate, having been previously informed by Hastings that he had signed the same in her name under the power of attorney. He also offered to prove that, after her return in August, and before this note was given, other notes were signed by Hastings as the attorney of said Maria, with no other authority than he

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then possessed under the power, which were subsequently paid by her.

The plaintiff asked the court to rule that the agreement of composition was evidence of a ratification of the act of Hastings in signing the note; but the judge ruled otherwise; held that there was no evidence for the jury; and instructed them to return a verdict for the defendant. To this the plaintiff excepted, and his exception is well taken.

The agreement offered in evidence described a large number of notes, including the note in suit, and contained a covenant to indemnify Comins, and save him harmless from all claims arising out of his having signed or indorsed the several notes therein named. In the absence of all other evidence, it is to be presumed that the intestate, when she signed that agreement, knew that her name had been signed to the note in suit by Hastings, nor is this presumption defeated by the proviso at the end of the agreement, by which each subscriber was only required to indemnify Comins from liability on such of the notes as were signed or indorsed by each. This was a necessary stipulation, inasmuch as the subscribers were not all parties to all the notes included in the agreement, and the provision could not have been intended merely to protect the parties from unauthorized signatures. It does not appear that Maria was a party to any other note than the one in suit, and if she was not, the agreement is strong evidence that she recognized the signature as valid and binding. *Monitor Ins. Co.* v. *Buffum*, 115 Mass. 343. As bearing upon this question, the failure of the intestate to repudiate or object to her liability on the note, after notice of non-payment; *Greenfield Bank* v. *Crafts*, 2 Allen, 269; as well as the fact that other notes, similarly signed after her return from abroad, were paid by her, without objection, was competent evidence. *Bragg* v. *Boston & Worcester Railroad*, 9 Allen, 54.

It is a rule in the law of agency, that when the unauthorized act of the agent is done in the execution of a power conferred, in a mode not sanctioned by its terms, and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. The duty to disaffirm at once, on knowledge of the act, is said to be more

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imperative in such cases, because the confidence of the principal in the fitness and fidelity of the person he has selected as an agent is shown by the relations already established between them. *Foster* v. *Rockwell*, 104 Mass. 167. *Brigham* v. *Peters*, 1 Gray, 139, 147. *Exceptions sustained.*

William H. Bailey *vs.* Inhabitants of Woburn.

Middlesex. Jan. 18, 1877; Jan. 11, 1878. — March 17, 1879.

Under the St. of 1871, *c.* 307, authorizing the town of Woburn to take the waters of a certain pond for the purpose of supplying the inhabitants of the town with pure water, and giving the right to take land for the purpose of constructing all works necessary for the distribution of the water, and providing that the town should be liable for all damages caused by such taking and construction, the town accepted the act, took land on the shore of the pond, and there dug a water-gallery and pumping-well, and made a connection by pipes between the pumping-well and the pond, but did not use these pipes, all the water coming into the well either by percolation from the pond or from underground streams. *Held*, on a petition by a mill-owner for the assessment of damages to his water-rights, that there had been a taking of the waters of the pond within the meaning of the act; but that such taking did not necessarily include all the waters of the pond, but so much only as was required for the purposes named in the act, including the future or prospective wants of the town.

The town of Woburn has no authority, under the St. of 1871, *c.* 307, to take water to sell to other towns; and, in assessing the damages of a person whose water-rights are injured by the taking, under the act, of the waters of a pond, the fact that any city or town in this Commonwealth may, under the St. of 1870, *c.* 93, purchase of any aqueduct company or municipal corporation the right to take water from its source of supply, is immaterial.

If a statute, giving a town the right to take the waters of a pond for the purpose of supplying the inhabitants of the town with pure water, contains a section authorizing another town to use such water upon paying proper rates, and this section is repealed after the taking of the waters of the pond, but before any use is made of them by the other town and before the filing of a petition for damages by a person injured by the taking of the waters of the pond, such person, if entitled to any damages by reason of such right of the other town, is entitled to nominal damages only, and, if he has recovered substantial damages for the injury caused him by the taking, the fact that the right of the other town to take the water was excluded in estimating his damages is no ground for setting aside the verdict.

Petition to the county commissioners of Middlesex, by the owner of a mill and water privilege on a natural stream running from Horn Pond in Woburn, for a jury to assess the damages

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sustained by him through the diversion of the waters of Horn Pond from that stream by the respondent in constructing and maintaining its water-works under the St. of 1871, *c.* 307.

Trial before a sheriff's jury, who returned a verdict for the petitioner for a less amount than that claimed by him. In the Superior Court, *Colburn*, J., ordered the verdict to be accepted against the objection of both parties; and they alleged exceptions. The facts appear in the opinion.

The case was argued in January 1877, and reargued in January 1878.

J. G. Abbott & B. Dean, for the petitioner.

T. H. Sweetser & G. A. A. Pevey, for the respondent.

ENDICOTT, J. The town of Woburn was authorized by the St. of 1871, *c.* 307, "to take, hold and convey to, into and through said town, the waters of Horn Pond, so called, in Woburn, or the waters of any other pond in Woburn," for the purpose of supplying its inhabitants with pure water. Full authority is given to the town to take land for this purpose, and to construct all works necessary for the distribution of the water; and provision is made that the town shall be liable for all damages caused by such taking and construction, which may be assessed in the manner provided by law with respect to land taken for highways, but no application for the assessment of such damages shall be made until the water is actually taken by the town. §§ 1–4. It is provided in § 5 that three commissioners shall be chosen by the town, to whom is intrusted the execution and performance of all matters and things relating to the construction and maintenance of the water-works contemplated by the preceding sections.

The town accepted the act, and three commissioners were chosen, who proceeded to perform their duties under it. They took for the purposes named in the act, and we presume in accordance with its provisions, two and a quarter acres of land on the shore of Horn Pond; and there dug and constructed a water-gallery and pumping-well, and erected an engine-house, and an engine to pump water into a reservoir built to contain it, and made a direct connection between the well and the pond by conduits or pipes.

1. It is stated in the record, that these pipes or conduits have

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not been used; and it seems to have been assumed by both parties, at the trial before the jury, that the waters collected in the pumping-well, which are pumped into the reservoir and distributed to the inhabitants, do not flow through these pipes or conduits, but percolate into the well, either from the pond, or from underground currents intercepted by the well before they reach the pond.

The respondent contended that none of the water collected in the well and pumped into the reservoir flowed from the pond; and that it is not liable for taking water which percolates into the well from the pond, or from the land adjacent to the pond.

The petitioner, on the other hand, contended that the appropriation by the town to its own use of the waters percolating from the pond, or from the land on their way to the pond, was a taking of the waters of the pond within the meaning of the St. of 1871, *c.* 307; and the presiding officer so ruled in substance, and to this ruling the respondent objected.

A forcible argument has been addressed to us by the respondent, touching the rights of landowners to appropriate to their own use all underground currents of water found on their own land, and the claim is made that the town, for the purpose of constructing its water-works, had the same right to excavate within the limits of the land taken under the St. of 1871, *c.* 307, that a private individual would have to dig upon his own land, and use and divert to his own use the water so obtained; and that, as such private owner would not be liable to another whose supply of water was thereby diminished, the town in this case is not liable to the petitioner.

But, in the view which we take of this case, this question does not arise; and it is unnecessary to consider at length the numerous authorities cited, or to determine whether the ruling of the presiding officer was in all respects strictly accurate, for upon the facts reported we are of opinion that there was a taking of the waters of the pond within the meaning of the act, and the petitioner was entitled to have his damages assessed by the jury.

The difficulty with the respondent's position is that the land was not taken or purchased for the purpose of digging wells and

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appropriating underground currents of water. The town had no authority under the act to take land for that purpose, or to obtain its supply from such a source, and originally had no intention of doing so. It could only take the waters of Horn Pond or some other pond in Woburn; and the case finds that it took this land under the statute on the shore of Horn Pond for the purpose of constructing thereon works and taking the waters of the pond. Such works were actually constructed for that purpose, and directly connected with the pond by pipes and conduits, thereby enlarging the area of the pond, and securing to the town, against all persons, the means of taking its waters. From the works thus constructed, it has supplied its inhabitants with water, and it is not contended that this petition is prematurely brought, under § 4, because the water has not been actually diverted and withdrawn.

Upon the inquiry, therefore, whether, upon these facts, the petitioner, under a petition properly brought, is entitled to damages, it is immaterial that the town discovered, after it began to pump up the water, that it could supply its inhabitants without using the connecting pipes and conduits, or that it can obtain a supply, abundant for its present needs, without using them at all. Under the powers conferred by the statute, the town has reserved to itself the right to take the waters of Horn Pond to supply the present and future wants of its inhabitants, and has provided itself with all the requisite means for doing so; and while it has supplied its inhabitants from the works it has constructed, and has not for that purpose used the conduits and pipes directly connected with the pond, yet it may and has the right to use them, and, if necessary, undoubtedly would do so.

The answer of the town to the petitioner's claim is, "While we have clothed ourselves with all the powers given by the statute to take the waters of Horn Pond, and under the powers conferred are distributing water, you can have no remedy, because we have not drawn water through those connecting pipes and conduits put in for that purpose, although we have the right to do so, if necessary." If this ground is tenable, then the petitioner is without remedy, if the town should now or hereafter use the pipes and conduits constructed for

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that purpose. *Ipswich Mills* v. *County Commissioners*, 108 Mass. 868.

We are therefore of opinion, that the town has taken the waters of the pond within the meaning of the statute; and, having done so, the petitioner is entitled to recover damages for the injury thereby caused to his property.

2. It is contended by the petitioner, that, under the St. of 1871, *c.* 307, the town had the right to take all the waters of Horn Pond, and that it had no authority to take a portion. But this construction is not correct. The town can take only so much water as is required for the purposes named in the act. This includes not merely what is sufficient for the present wants of the inhabitants, and those for whom it was intended to provide, but for their future or prospective wants. Undoubtedly, power was granted to take all the waters of the pond, if all should be needed for those purposes; but the statute did not intend that all the water should be taken, if all was not necessary. As the petitioner could receive compensation but once, he was entitled to recover future and prospective as well as the immediate damages caused by the taking, but he could not recover damages for a diversion of all the water, unless by the taking all was to be actually diverted. *Ipswich Mills* v. *County Commissioners*, above cited.

3. Nor has the petitioner any just ground of objection to the direction of the presiding officer that the town of Woburn had no authority to sell or lease water to other towns. No authority is given by the act to take water for the use of other towns, (except Winchester,) or to sell or lease to other towns; and such authority cannot be implied from the St. of 1870, *c.* 93, which provides that cities and towns may, for the purpose of supplying pure water to their inhabitants, purchase of any aqueduct company or municipal corporation the right to take water from its source of supply, or from the pipes leading therefrom. Without attempting to define the extent of the powers here given to a town to sell water, it is very clear that the act gives no authority to towns to procure water for that purpose, and cannot extend the right of Woburn, under the St. of 1871, *c.* 307, to take the waters of Horn Pond for the purpose of selling them to other towns.

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4. It is provided in § 10 that the inhabitants of Winchester may take the water under the St. of 1870, *c.* 93, upon payment of proper rates. The water was actually withdrawn by Woburn from the pumping-well on September 22, 1873, and this section was repealed on February 14, 1874. St. 1874, *c.* 19.

It is the right of the petitioner to have all his damages assessed, present and prospective, and the possible diminution of the flow of water, by reason of the power of Winchester to take, was one of these prospective damages, which the jury would have the right to consider in estimating the damage to the petitioner's property. But before the hearing, and indeed before the filing of the petition, this right of Winchester was abrogated by the Legislature, and Winchester had no right to use water and Woburn had no right to withdraw it from the pond for the use of Winchester after the repeal. The damages to be assessed on this account were wholly contingent upon the authority of Winchester to take and Woburn to supply, which authority had been repealed before any actual use of the water had been made by Winchester. Without deciding, therefore, whether it was strictly accurate to say that nothing should be allowed for it, it is clear that only nominal damages could have been allowed; and we should not set aside a verdict giving to the petitioner substantial damages for all that he is really entitled to, because of the failure to add nominal dam ages.

While the right of Winchester to buy under the St. of 1870, *c.* 93, may remain, if Woburn had the right to sell, yet, as the statute stands, Woburn clearly has no right to withdraw the water for that purpose. *Verdict accepted.*

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ÆTNA MILLS *vs.* INHABITANTS OF WALTHAM.

Middlesex. Jan. 11, 1878. — March 17, 1879. AMES & LORD, JJ., absent.

Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River, for the purpose of supplying the inhabitants of the town with pure water, and providing that a person injured by such taking may apply by petition to the Superior Court, and that the court may, "upon default or hearing of said town," appoint three disinterested persons to assess the damages sustained by the petitioner, their award to be final, unless either party shall demand a trial by jury, the merits of the controversy between the parties are not to be gone into at the hearing upon a motion for the appointment of commissioners; but the court is to ascertain whether a case is presented which requires the appointment of commissioners, and to determine who are suitable persons to be appointed.

Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River, water-rights connected therewith, and lands necessary for the purpose of supplying the inhabitants of the town with pure water, neither the petition of a person injured by such taking nor the verdict of the jury awarding damages need allege that the town has complied with § 2 of the statute, requiring the town to file in the registry of deeds a description of the property taken.

If a town takes the waters of a stream, under a statute authorizing it so to do, for the purpose of supplying the inhabitants of the town with pure water, it is no defence to a petition for damages sustained by a person injured by such taking, that the town owned a parcel of land adjoining the stream, and that the inhabitants of the town had been accustomed, from time immemorial, to use the waters of the stream for drinking and domestic purposes.

Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River and water-rights connected therewith, for the purpose of supplying the inhabitants of the town with pure water, and providing in § 3, that, if the owner of property taken or person sustaining damages "shall not agree on the damages to be paid therefor," he may file a petition for the assessment of his damages, the filing of a petition shows the election not to agree, and no previous attempt at an agreement is necessary.

Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River, for the purpose of supplying the inhabitants of the town with pure water, the town voted to accept the act, and to take the water from the river, to the amount of one million of gallons a day. It also dug a filtering basin on land near the river, taken under the act, pumped the water from this basin to a reservoir and distributed it to the inhabitants. A portion of the water in the basin came by percolation from the river and the rest from underground streams intercepted by the basin on their way to the river. *Held*, that there had been a taking of the waters of the river, within the meaning of the act, to the amount of one million of gallons a day; and that a person whose water-rights had been injured by such taking was entitled to recover for the injury to the market value of his property arising from the diversion of that quantity of water.

ENDICOTT, J. The town of Waltham was authorized by the St. of 1872, *c.* 337, to take the waters of Charles River, or Stony

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Brook, to an extent not exceeding a million and a half gallons daily, for the purpose of supplying itself and its inhabitants with pure water, and to take land, and construct and maintain all works necessary for its distribution. The town voted to accept the act, and to take water from Charles River to the amount of a million gallons daily, which vote was duly recorded, under § 13. In pursuance of this vote, the town took a parcel of land bordering on the river, constructed a filter basin from which water is pumped into a reservoir and distributed to its inhabitants. The petitioner, being the owner of a mill situate on the river, filed this petition in the Superior Court for the assessment of damages to its property caused by the withdrawal and diversion by the town of a million gallons of water daily from the river. The respondent appeared and filed an answer; and a motion having been made for the appointment of commissioners, as provided in § 3, the respondent objected to the appointment on the ground that it had the right to be heard, on the defences set up in its answer, before the appointment. It was admitted at that hearing that the town had taken land bordering on the river, had constructed works, and was distributing water therefrom, as previously stated; but denied that the water came from the river, or belonged to the petitioner. The court overruled the objection, and appointed the commissioners, whose award was afterwards accepted by the court. The respondent then claimed a trial by jury, which was had, and a special verdict returned; and the case comes before us on the respondent's exceptions.

1. The first exception is to the appointment of the commissioners. Section 3 of the act provides that "the said court may, upon default or hearing of said town, appoint three disinterested persons, who shall, after reasonable notice to the parties, assess the damages, if any, which such petitioner may have sustained;" their award when accepted by the court to be final, unless either party shall demand a trial by jury.

This clause is not intended to provide for a hearing upon the merits of the controversy between the parties, but to ascertain whether a case is presented which requires the appointment of commissioners, and to determine who are suitable persons to be appointed. The presiding judge was not called upon to

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pass upon the question whether the waters of Charles River had been taken by the respondent, and whether any damage had been inflicted on the petitioner. This inquiry involved questions of fact. If he should find against the petitioner on that question, the statute makes no provision for appeal, or for revision of his finding; while it does provide that the question of damages shall not be finally determined against either party without the right of trial by jury; and trial by jury cannot be had until after the case has been sent to commissioners, and their award returned into court. See *Dwight Printing Co.* v. *Boston*, 122 Mass. 583. The commissioners, therefore, were properly appointed.

2. The respondent contends that the court erred in ordering judgment on the special verdict, because the petition did not allege, and the special verdict does not find, that the water of the river was taken according to the provisions of § 2, by filing in the registry of deeds "a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same is taken, signed by the water commissioners" of the town. It is to be observed that the objection raised is not that the description was not filed, and the record does not in terms show that it was not filed, but the objection is that it does not appear in the petition or the verdict that such a description was filed. The petitioner, on the other hand, contends that this provision of § 2 does not apply to the taking of the water of the river; but that § 13 contains the provisions under which the water of the river is to be taken. The statute is inartificially and carelessly drawn, and §§ 2 and 13 contain obscure and perhaps conflicting provisions; but, assuming that it was the duty of the commissioners to file such a statement under § 2, and conceding that the petition does not allege, and the verdict does not find, that they did so, we are of opinion that, upon the case as presented, the respondent cannot avail itself of this objection.

The special verdict finds that the town accepted the act, decided to take the water of Charles River to the extent of a million gallons daily, which vote was duly recorded as provided in § 13. The verdict also finds that, under and by virtue of the provisions of the act, the town took land bordering on the river, made a basin therein from which water was pumped into a reservoir and distributed to the inhabitants for the purposes

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named in the act. It therefore sufficiently appears that the town had exercised the rights, and was in the actual enjoyment of the privileges, conferred by the statute; and, while exercising these rights and enjoying these privileges, it cannot now avail itself of the purely technical objection, that it does not appear either in the petition or the verdict that its agents complied with the requirements of § 2, and thereby defeat the claim of the petitioner for damages. It is not necessary that the petition should allege, or the verdict find, that every step in the proceedings on the part of the town or its agents was taken as provided in the statute. Having acquired, under the statute, all the powers conferred, it is to be presumed that all the requirements of the statute have been complied with, and that a proper description of lands, ponds and water-rights taken under § 2 had been filed.

3. Nor can the right of the petitioner to recover damages for water diverted from its mill be impaired or affected because the town, as the owner of a farm bordering on the river, had the rights of a riparian proprietor in the waters of the stream; or because any of the inhabitants who chose had been accustomed to use the water of the river, from time immemorial, for drinking and domestic purposes, and for extinguishing fires, without interference or hindrance from any person.

We are not called on to consider what may be the rights of riparian proprietors to take water from the river for the purpose of selling it or disposing of it to other persons for any purpose, as the town took the water, not as a riparian proprietor, but by virtue of the powers conferred by the statute; and, as it took the water as a corporation, it is entirely unimportant what may have been the custom of its individual inhabitants to take water therefrom for domestic and other purposes. The statute does not limit or deprive the riparian owners of any legal right they may have in the waters of the stream; or restrain the individual inhabitants of the town from taking the water, according to their custom, if they have the right so to do; but it confers a new privilege on the town as a corporation, and provides that it shall pay all damages caused by the exercise of that privilege.

4. Under § 3, which provides that if the owner of property taken or person sustaining damages "shall not agree on the

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damages to be paid therefor," he may file a petition for the assessment of his damages, it is not a condition precedent to the right to file such petition that it should appear that the parties did not agree upon the damages to be paid; the filing of the petition shows the petitioner's election not to agree, and no previous attempt is necessary. *Burt* v. *Brigham*, 117 Mass. 307.

5. It is also contended by the respondent, that it is not liable to the petitioner for taking the water from its filter basin, which percolates from the land adjacent, and which is intercepted by the basin before it reaches the river. The special verdict finds that a part of the water in the filter basin, which is pumped into the reservoir to be distributed to the inhabitants, comes from underground currents in the bank flowing towards the river; and a part percolates into the basin from the river itself; but the jury were unable to determine what portion came from the underground currents, and what portion came from the river.

But, for reasons stated at length in *Bailey* v. *Woburn*, *ante*, 416, we are of opinion that the rights of the owners of land to appropriate to their own use underground currents of water are not involved in this inquiry. The town has by its vote determined and declared that it will take the waters of the river to the extent of a million of gallons daily, has constructed works for that purpose, and by these works has withdrawn the water to supply its inhabitants; and it is found by the jury that a portion of this water, so distributed, comes from the river. It is immaterial that all the water thus taken does not come from the river itself. The town has acquired the right, and has built works enabling it, to take from the river a million gallons daily, and is exercising that right by actually withdrawing from the river all the water which for the time being is necessary for its purposes. That it may rightfully draw from the river the full measure of one million gallons daily cannot be questioned; and if the owner of the land above, from which the underground currents flow into the basin, should appropriate them to his own use, then the respondent would be obliged to draw all the water from the river for its supply.

We are therefore of opinion that the town has taken the waters of Charles River within the meaning of the act; and as

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the damages to the petitioner can be assessed but once, the petitioner is entitled to recover damages for injury to the market value of its property, arising from the diversion of that quantity of water which the town, under the authority of the statute, has declared its purpose to take. *Ipswich Mills* v. *County Commissioners*, 108 Mass. 363. *Exceptions overruled.*

B. F. Butler, for the respondent.

T. L. Livermore, (*E. R. Hoar* with him,) for the petitioner.

J. S. READ *vs.* CITY OF CAMBRIDGE.

Middlesex. Jan. 8. — March 17, 1879. COLT & ENDICOTT, JJ., absent.

Under the St. of 1872, *c.* 299, authorizing the city of Cambridge to fill lands to a certain grade to abate a nuisance, and providing that any person dissatisfied with the assessment of the expense of raising his land may give notice thereof to the city, and the city shall thereupon take said land, and that the damage done by such taking may be assessed by a jury, the owner of land so taken is entitled to recover the entire value of the land taken, without any deduction on account of mortgages and liens thereon.

PETITION to the county commissioners for a jury to assess damages for the taking by the respondent of four lots of land in the Franklin Street District, so called, in Cambridge, under the St. of 1872, *c.* 299.*

At the trial before a sheriff's jury, it appeared that the grade of each lot had been raised by the respondent under said act; that the expense thereof was assessed to the petitioner, who, being dissatisfied with the assessment, surrendered "all his said estate in said district" to the respondent; that the respondent thereupon passed an order, setting forth that J. S. Read claimed "to be entitled to an estate" in the lots of land, describing them by metes and bounds, and concluding as follows: "It is therefore ordered that the estate of the said J. S. Read in the above-described lots of land be and the same is hereby taken, pursuant to the provisions of said act."

It further appeared that, at the time of the taking, the peti-

* The provisions of this act are stated *post*, p. 439.

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tioner was in possession of the four lots, which were subject to certain mortgages, containing powers of sale, and that one lot had been assessed by the city for the cost of making a public sewer, for the non-payment of which, the lot was, after the surrender, and on the day of the taking, offered for sale by the city collector, and, no one bidding thereon, was conveyed by him, for the assessment and costs, to the respondent.

The sheriff ruled, against the respondent's objection, that the petitioner's damages were to be assessed as of the value of the fee in the lots of land, without regard to the incumbrances upon them. The jury returned a verdict for the petitioner accordingly. In the Superior Court, the verdict was accepted; and the respondent appealed to this court.

J. W. Hammond, for the respondent.

C. T. Russell & C. T. Russell, Jr., for the petitioner.

BY THE COURT. This case is governed by *Farnsworth* v. *Boston*, *ante*, 1. In every taking of land for the public use, the mortgagor is regarded, in this Commonwealth, as having, at law, the entire estate in the premises, and entitled to recover the whole value thereof, estimated according to the provisions of the statute, without any deduction on account of the mortgages and liens thereon. *Judgment affirmed.*

CITY OF CAMBRIDGE *vs.* ABIEL F. FIFIELD & others.

Middlesex. Jan. 9.—March 17, 1879. COLT & ENDICOTT, JJ., absent.

In an action on a bond, dated in 1867, and conditioned for the faithful performance by A. of the duties of water registrar of a city, it appeared that by the ordinances of the city, passed in 1867, a water registrar was to be elected by the water board, and "hold office during the pleasure of the board," and give bonds for the faithful performance of his duties; that under these ordinances A. was duly elected water registrar in 1867, and continued to perform the duties of the office until 1876, without any other election; and that in 1870 the city made a general revision of its ordinances, the new ordinances reënacting the provisions of the old as to the water board without any material change, and containing the following provision: "All ordinances heretofore passed by the city council of the city are hereby repealed; but such repeal shall not affect any act done, any right accruing, accrued or established, the tenure of office of any person holding

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office at the time it takes effect, or any forfeiture or penalty heretofore incurred." *Held*, that the office of water registrar was not vacated by the revision; and that the sureties on his bond were liable for a default occurring after the revision.

CONTRACT against Abiel F. Fifield, George W. Fifield and Israel Tibbetts, on a bond in the sum of $5000, dated May 7, 1867, executed to the plaintiff by the first-named defendant as principal, and the others as sureties, and containing the following condition: "Whereas the said Abiel F. Fifield has been duly elected by the Cambridge water board water registrar, now if he shall well and faithfully perform the duties of said office, then this obligation shall be void and of no effect, otherwise shall be and remain in full force and effect."

Trial in this court, without a jury, before *Endicott*, J., who found that there had been a breach of the bond; ordered judgment for the plaintiff for the penalty of the bond; and directed the case to be sent to an assessor to determine the amount for which execution should issue. The defendant Tibbetts alleged exceptions, the material parts of which appear in the opinion.

D. S. Richardson, for Tibbetts, cited *White* v. *Fox*, 22 Maine, 341; *Chelmsford Co.* v. *Demarest*, 7 Gray, 1.

J. W. Hammond, for the plaintiff.

MORTON, J. By the ordinances of the city of Cambridge in force when the bond was executed, the Cambridge water board consisted of seven persons, the mayor and president of the common council being, *ex officiis*, members, the other five being elected by the city council, one being elected each year. City Ordinances of 1865, § 1. Section 3 of the Ordinances of 1867 provides that "the water board shall elect a water registrar, who shall hold office during the pleasure of the board and shall receive such compensation as the board may determine. He shall give bonds in the sum of five thousand dollars for the faithful performance of his duties."

Under these ordinances Abiel F. Fifield was duly elected water registrar in 1867, and continued to perform the duties of the office, without any other election, until 1876. This election cannot be regarded as an election for a year, or for any stated or fixed period of time. By the ordinances, the water board was made a quasi corporation or continuing body. Although its members might be changed from year to year, its legal existence

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as a board continued. There was no occasion for an annual election of a water registrar, but he continued to hold his office by its original tenure, during the pleasure of the board.

In December 1870, the city of Cambridge made a general revision of its ordinances. The new ordinances reënacted the provisions of the old ordinances as to the water board, without any material change. The defendant Tibbetts now contends that the effect of the repeal of the old ordinances was to discharge him from his liability on the bond in suit. But the revised ordinances contain the following provision: "All ordinances heretofore passed by the city council of the city of Cambridge are hereby repealed; but such repeal shall not affect any act done, any right accruing, accrued or established, the tenure of office of any person holding office at the time it takes effect, or any forfeiture or penalty heretofore incurred." Ordinances of 1870, c. 32, § 5.

One obvious purpose of this enactment was to prevent the disturbance which would be occasioned by the displacement of all the officers of the city, and to continue each of such officers in his office according to its original tenure. Under it, the water board was not abolished, but it continued to exist, and its old members held their office until it expired and new members were elected in their places. The water registrar continued to hold his office by the same tenure by which he had held it since his appointment, namely, at the pleasure of the water board. There was no necessity for a new appointment, because, by the effect of the revised ordinances, the tenure of his office was not affected, but he continued to hold it according to its original tenure. The revision did not in any way enlarge or change the responsibility of the sureties on his bond, and we are of opinion, therefore, that such sureties were not discharged, but remained liable upon his bond, and therefore were responsible for the defalcations of the principal obligor occurring after the enactment of the revised ordinances. *Exceptions overruled.*

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ORRIN B. RANLETT & another *vs.* CITY OF LOWELL.

Middlesex. Jan. 9. — March 17, 1879. COLT & ENDICOTT, JJ., absent.

An ordinance of a city, forbidding any person from entering a private drain into a public sewer, without a written permit of the board of aldermen, is valid; and no action can be maintained, either by a person who, after paying the sum assessed upon him for constructing the sewer, builds a private drain connecting with it, without a permit, or by a tenant of his heirs, for an injury caused by an overflow of the sewer through the drain, even though the overflow is caused by the negligence of the city.

TORT for injury caused by the overflowing of a common sewer into the plaintiff's cellar and shop, through a drain connecting the cellar with the common sewer.

At the trial in the Superior Court, before *Aldrich*, J., it appeared that the common sewer was built under the St. of 1869, *c.* 111, in Dutton Street in Lowell in 1873, under the direction of the mayor and aldermen, the superintendent of streets having charge of the work; that at the time the sewer was built, Daniel H. Richardson was the owner of the estate on which the plaintiff's premises now are; that Richardson is dead, and the plaintiffs are tenants of his heirs; that Richardson and other abutters on the street were assessed a portion of the expenses of building the sewer, and Richardson's assessment was paid.

By the ordinances of the city of Lowell, "No person shall cut into, interfere with or obstruct a main drain or common sewer, or shall enter a private drain therein, except as herein prescribed." A subsequent section provides that "the board of aldermen may grant written permits to any persons to enter any main drain or common sewer;" "provided such persons shall first pay the assessment; and provided further that, in the materials, constructing and maintaining of such particular drain, he shall comply with the conditions that the board of aldermen may prescribe." And, by another section, a penalty is imposed for violating the above provisions.

Some time after the sewer was completed, Richardson laid a private drain from the bottom of the cellar now occupied by the plaintiffs, and entered the same into the common sewer; but there was no evidence that Richardson had any authority or permission so to do from the city or any of its officers, or from

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the mayor and aldermen; nor did it appear that the existence of the private drain was known to the city or any of its officers until after the occurrence of the damage complained of in this action.

The overflow, which consisted of water and filthy and offensive sewage, occurred in August 1877. The plaintiffs offered evidence tending to show that the overflow was caused by obstructions in the sewer, which prevented a free flow and passage of water and sewage through the sewer; and that the obstructions existed through want of due care and attention on the part of the defendant, and by reason of the negligence and bad management of the defendant in taking care of the sewer.

The defendant asked the judge to rule that the plaintiffs, having failed to show that they or Richardson had any permission or authority from the defendant or any of its officers, or its mayor and aldermen, to enter the sewer with the private drain, or to maintain the same, could not recover. The judge so ruled; and ordered a verdict for the defendant. The plaintiffs alleged exceptions.

G. Stevens, for the plaintiffs.

G. F. Richardson, for the defendant.

AMES, J. The sewer in question was constructed by the city of Lowell, under its lawful authority, not only for the proper drainage of the street, but also to furnish the means or opportunity for the drainage of the adjoining houses and building lots. It was the property of the city, and the city was bound to maintain and keep it in repair. *Child* v. *Boston*, 4 Allen, 41. St. 1869, *c.* 111. The owners of the adjoining estates were assessed for the reason that those estates were benefited and made more valuable by being furnished with the means or opportunity of securing suitable drainage. But, according to the ordinance of the city, the landowner, in order to connect his own private drain with the main sewer, was required to obtain the written consent of the mayor and aldermen, to pay his assessment, and, in the materials and construction of his drain, to comply with the directions and conditions that the mayor and aldermen might prescribe. We see nothing unreasonable or contrary to the general policy of the law in any of the provisions of this ordinance. It is obvious that the obligation of the city to keep the sewer in repair might

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be rendered greatly more burdensome, perhaps even impossible of fulfilment, if the adjoining landholders were allowed to construct their connecting sewers or drains, each according to his own notions of convenience and economy, both as to materials and mode of construction. It must be supposed that the purpose of the ordinance was to make it reasonably certain that such connections should be made upon some system intended for uniformity and permanence, or at least under the supervision of the proper city officers.

As this case is presented to us, there was no evidence that the former owner of the land now occupied by the plaintiffs ever obtained the written consent of the mayor and aldermen, or any consent of the city or any of its officers, to enter the sewer with his private drain, nor did it appear that the defendant or any of its officers knew of its existence. So far, therefore, from having a right in the main sewer, he was a mere trespasser, to whom the defendant owed no duty whatever. As the plaintiffs derive their title from him, they have no right of action for the cause alleged in their declaration. *Exceptions overruled.*

WILLIAM S. PARKER, executor, *vs.* COMFORT PARKER & another.

Middlesex. Jan. 13.— March 17, 1879. COLT & SOULE, JJ., absent.

A testator left a widow, three sons, three married daughters and one unmarried daughter then about seventeen years of age. By his will he gave to each of his married daughters legacies in money, and to his unmarried daughter a small sum of money and "a home and maintenance during the time she remains unmarried." To his widow he gave the use and income of all his real and personal estate during life, which consisted of about $2000 in personal property and three farms, on one of which was the homestead where the testator had always lived with his family. To one of his sons he gave nothing, he having received his full share, and to his other sons he gave the remainder of all his property real and personal in equal shares, upon the death of his wife, "they and each of them giving their personal services during my life and the life of their mother in cultivating the premises where I live to the best of their ability." The widow died three years after her husband. The unmarried daughter continued to reside and receive her maintenance at the homestead for four years after the testator's death, when she left on the ground that she was entitled to

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be maintained where she might choose to reside. *Held*, that the "home and maintenance" given by the will to the unmarried daughter was intended to be a home and maintenance on the premises where the testator lived at the time of his death; and that she was not entitled to be supported elsewhere.

BILL OF INTERPLEADER, by the executor of the will of Nathan Parker, against Comfort Parker and Bernice Parker, to determine the rights of the parties in interest under the will of the testator, dated April 8, 1869, which contained the following clauses:

"First. My will is that all my just debts shall be paid in full, with all the expense of my burial.

"Second. I hereby give and bequeath to my wife, Fanny Parker, the use and income of all the property, both real and personal, of which I may die seised and possessed, during her natural life.

"Third. I give and bequeath to my daughter, Belinda B. Sawyer, one hundred dollars, to be paid her after the decease of my wife.

"Fourth. I give and bequeath to my daughter, Frances P. Hall, wife of Luther B. Hall, one hundred dollars, to be paid her at the time of payment to said Belinda.

"Fifth. I give and bequeath to my daughters, Caroline Farmer and Mehitable Peabody, twenty-five dollars each, to be paid as in the fourth bequest.

"Sixth. I give and bequeath to my daughter, Comfort Parker, one hundred dollars, to be paid at the time the other bequests are paid, also a home and maintenance during the time she remains unmarried.

"Seventh. My son, Nathan Parker, Jr., having received his full share of my estate, I hereby give and bequeath to my two sons, William S. Parker and Bernice Parker, the remainder of all the property, both real and personal, of which I may die possessed, after the payment of debts and legacies as aforesaid, and the decease of my wife, share and share alike, they and each of them giving their personal services during my life and the life of their mother in cultivating the premises where I live to the best of their ability.

"Finally. I hereby nominate and appoint my son, William S. Parker, sole executor of this my last will and testament."

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Hearing before *Colt*, J., who reported the case for the determination of the full court in substance as follows:

The testator died in 1870, and the debts and legacies, with the exception of the legacy to Comfort Parker, which is in dispute, have all been paid, leaving to the residuary legatees, William S. and Bernice, certain personal property of the appraised value of $1988, and also three farms, with the buildings thereon, and some out lands, containing in all two hundred and seventy-four acres, and appraised at $11,200. William S. resides on the homestead farm, where the testator lived and died, and Bernice has quitclaimed his interest therein to him. Bernice resides on another of these farms, and William S. has quitclaimed his interest therein to him. Part of the other farm and out lands has been sold by them, and the residue of the same has been divided between William S. and Bernice by mutual deeds of release. On the homestead, where the testator died, there was a suitable dwelling-house, where the testator had always lived and brought up his family, and where his wife continued to live nearly all the time, except during her last illness of nine weeks at her daughter's, until her death in October 1873. Comfort, who was about seventeen years old when her father died and was his youngest child, lived on the homestead before and after her father's death until October 1874, when she left and went to live in the neighboring city of Lowell. Since the father's death, one or both of the sons named as residuary legatees have occupied the homestead with the mother.

Comfort Parker contended that, under the provision in question, she was not required to reside at the homestead of the testator to entitle her to the home and maintenance provided, but had the right to reside, have a home and be maintained, or be supported and maintained, elsewhere, within reasonable limitations, irrespective of her ability, by labor or otherwise, to maintain herself; and to receive from the estate a suitable pecuniary allowance therefor. She also contended that, if this was not the true construction, yet she was entitled to receive such pecuniary allowance in this case, because she was justified in leaving the homestead by reason of her brothers' ill treatment of her. The sons contended that the only right given to Comfort

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was to have a home and receive support at the homestead so long as they were willing to provide for her there; and that she was not justified in leaving by any ill treatment on their part, but left voluntarily, for reasons of her own.

Upon the question whether Comfort was justified in leaving on account of the ill treatment of her brothers, the judge found, as a fact, that Comfort was not justified in leaving the homestead and claiming an allowance for support elsewhere, and reserved the questions of law arising on the construction of the will for the consideration of the full court; such order or decree to be entered as law and justice might require.

J. N. Marshall & M. L. Hamblet, for Comfort Parker.

D. S. Richardson, (*G. F. Richardson* with him,) for Bernice Parker.

ENDICOTT, J. The court is of opinion that the "home and maintenance" given to Comfort Parker, by the will of her father, was intended by him to be a home and maintenance on the premises where he lived at the time of his death; this intention is to be gathered from this and other provisions of the will and the circumstances which surrounded the testator at the time it was made.

The testator left a widow, three sons, three married daughters, and Comfort, then about seventeen years of age. He gave to each of his married daughters legacies in money, and to Comfort a small sum of money, and "a home and maintenance during the time she remains unmarried." To his widow he gave the use and income of all his real and personal estate during life. This estate consisted of about $2000 in personal property, and three farms, on one of which was the homestead where the testator had always lived with his family. To one of his sons he gave nothing, he having received his full share; and to his other sons, William S. Parker, the executor, and Bernice Parker, one of the defendants, he gave the remainder of all his property real and personal in equal shares, upon the decease of his wife, "they and each of them giving their personal services during my life and the life of their mother in cultivating the premises where I live to the best of their ability." He makes no other provision for these sons during the lifetime of their mother, and it is not to be supposed that he intended that they should give

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their services without any remuneration or any provision for their support.

Although this clause is inartificially drawn, it is clear that it was the intention of the testator that the sons, who were to have the property on the decease of their mother, should give their services in cultivating the homestead, reside there, and receive their support from the estate with their mother, and that it should continue to be the home of the family. This is the home in the mind of the testator referred to in the legacy to Comfort. Intending to provide for his wife and sons a home and maintenance on the homestead, it is not to be presumed, in the absence of express words, that he intended that Comfort, then a girl of seventeen, while unmarried, should have a home and maintenance elsewhere. Such was the practical construction put upon the will by the parties; for Comfort continued to reside and receive her maintenance there until a year after her mother's death, which occurred in 1873, when she left, on the ground that she was entitled to be maintained where she might choose to reside. That she was not justified in leaving by reason of ill treatment on the part of her brothers has been determined by the finding of the presiding judge.

The homestead is now owned and occupied by her brother William S. Parker, the executor of the will, and he is ready and willing to provide for her a home and maintenance there; and we are of opinion that he is not bound to provide her a home and maintenance at another place, at her election. Upon the question what would be her rights, if he should refuse to do so, or should dispose of the estate, we express no opinion.

The numerous cases cited at the argument afford but little assistance in deciding this question. Where a testator provides in his will that his wife, child or other person shall be supported and maintained by his executor, or where the condition of a deed or mortgage recites that the grantee or mortgagor shall support the grantor or mortgagee, and the instrument does not point out that the support shall be provided in a particular place, then the party so entitled may have the support where under reasonable limitations he may choose to reside. But if the instrument points out the place where the support shall be furnished, it is not the right of the party entitled to receive it to

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demand that it shall be furnished elsewhere. Each case must be decided on its own facts, looking at the language of the instrument and the surrounding circumstances. See *Crocker* v. *Crocker*, 11 Pick. 252; *Baker* v. *Dodge*, 2 Pick. 619; *Wilder* v. *Whittemore*, 15 Mass. 262; *Thayer* v. *Richards*, 19 Pick. 398; *Pettee* v. *Case*, 2 Allen, 546; *Conkey* v. *Everett*, 11 Gray, 95; *Hubbard* v. *Hubbard*, 12 Allen, 586; *Conant* v. *Stratton*, 107 Mass. 474; *Willett* v. *Carroll*, 18 Md. 459.

Decree accordingly.

GEORGE BANCROFT & others *vs.* CITY OF CAMBRIDGE.

Middlesex. Jan. 17, 1878.—March 24, 1879. ENDICOTT & SOULE, JJ., absent.

The St. of 1872, *c.* 299, authorizing the city of Cambridge to order the owners of lands to fill them to a certain grade to abate a nuisance, and providing that, on failure to comply with the order, the mayor and aldermen may raise the grade thereof, and the expense incurred shall be a lien on the land filled; that any one dissatisfied with the assessment of the expense of raising the grade may, within a certain time after notice of the same, give notice to the mayor and aldermen of his dissatisfaction, "and the city shall thereupon take said land, and shall within sixty days file in the registry of deeds" a description of the same, and a statement that it is taken under the provisions of the act; and that a person whose land is taken may have a trial by jury "to determine the damage so done him, making due allowance for the improvement by raising the grade of such land," is constitutional; and, in assessing damages, the value of the property is to be estimated as of the time when notice of the dissatisfaction with the assessment is given, and not as of the time of filing the description in the registry of deeds; and no allowance is to be made for the inconvenience suffered by the owner in consequence of the acts of the city in filling the land. And the same rule applies to proceedings in Boston under the St. of 1873, *c.* 340.

PETITION to the county commissioners for a jury to assess damages for the taking by the respondent of several parcels of land in the Sparks Street District, so called, in Cambridge, under the St. of 1872, *c.* 299.

At the trial before a sheriff's jury, a verdict was rendered for the petitioners for less than the amounts respectively claimed by them; the Superior Court on their motion set aside the verdict; and the respondent appealed to this court. The facts appear in the opinion.

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J. W. Hammond, for the respondent.

D. S. Richardson, for the petitioners.

COLT, J. The St. of 1872, *c.* 299, provides that the mayor and aldermen of the cities of Cambridge and Somerville may establish a grade in their respective cities not less than thirteen feet above mean low water, and may from time to time order the owners of lands to raise them to the grade so established, "with reference to a complete drainage thereof, so as to abate and prevent nuisances, and to preserve the public health." If the owner fails to comply with the order within six months after service thereof upon him, the board of mayor and aldermen may then raise the grade, as specified in the order, and all expense incurred thereby shall be a lien on the lands filled, to be collected in the manner provided for the collection of taxes on real estate. It is then provided, in § 6, that any one dissatisfied with the assessment of the expense of raising the grade of his land may, within six months after receiving notice of the same, apply for a jury to revise the same; and, by § 7, that he may, instead of applying for a jury, give notice within sixty days to the mayor and aldermen of his dissatisfaction, "and the city shall thereupon take said land, and shall within sixty days file in the registry of deeds" a description of the same, and a statement that it is taken under the provisions of the act. By § 8, if any person whose land is taken does not agree with the city on the amount of damage done to him by such taking, he may apply at any time "within six months from the filing of such description and statement," "for a jury to determine the damage so done him, making due allowance for the improvement by raising the grade of such land," and proceed as provided in the Gen. Sts. *c.* 48, in the laying out of highways.

Under these provisions, the mayor and aldermen of Cambridge ordered the petitioners to raise the grade of their lands by an order approved June 21, 1873. The order was not complied with within six months after receiving notice thereof. In October 1874, the grade was raised by the city, and an assessment of the expense was made in April 1876 upon the several petitioners, notice of which was given them May 24 of the same year. On the last day of the same month, the petitioners gave notice that

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they were dissatisfied with this assessment, and requested the city to take their several lots according to the provisions of the act. But the city did not file in the registry of deeds the statement and description required by the act until September 23 of the same year.

At the trial before the jury to determine the damages which the petitioners had sustained by the taking of the land, the sheriff directed the jury that the question for them was the value of the property on September 23, 1876, the day when the description of the land and the statement that it was taken under the act were filed in the registry of deeds.

This direction was wrong. By the terms of the act, the city is absolutely required to take the land immediately upon notice of dissatisfaction on the part of the landowner with the assessment. The words of § 7 are, that "the city shall thereupon take the land and shall within sixty days thereafter file in the registry of deeds" the required statement. This clause makes the taking of the land one thing, and the filing of the certificate an independent and subsequent act, made necessary to secure record evidence of the taking of the particular land described, which the city may be compelled to perform by mandamus, as an act necessary to perfect the taking. *Farnsworth* v. *Boston*, 121 Mass. 173. *Attorney General* v. *Boston*, 123 Mass. 460, 476. The statute is peremptory in the requirement to take; no discretion or election is to be exercised by the city. No further entry is to be made, or other act is to be done. The landowner's title is then immediately devested by operation of law. The time of the taking was when, upon notice of dissatisfaction, the title by operation of law vested in the city; and the value at that time was the matter to be determined by the jury.

The case differs from that of a railroad, in which the taking of the land depends not upon any election of the owner, but upon the will of the corporation, and in which the location filed by the latter fixes the date as of which the damages shall be assessed. *Hampden Paint Co.* v. *Springfield, Athol & Northeastern Railroad*, 124 Mass. 118. *Old Colony Railroad* v. *Miller*, 125 Mass. 1. It is almost superfluous to add, inasmuch as it is necessarily involved in the view above stated, that the value of the land is not to be estimated as of any date earlier than the

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surrender by the owner; for the passage of the order for raising the grade, and the proceedings of the city in carrying out that order, fix neither the date of the taking of the land by the city, nor the obligation of the city to take it.

The other question presented is, whether the loss and inconvenience occasioned by the proceedings of the city, in filling the land before the title was taken, and by the delay in making the assessment, are proper elements to be considered in assessing damages for the taking. We are of opinion that they are not. The compensation to which the owner is entitled is the value of the land at the time of the taking, making due allowance for the improvement. This excludes loss or inconvenience caused to the owner by all proceedings prior to the taking. The purpose of the statute is to give to each owner the right to elect whether he will pay the expenses of filling his land and retain his estate; or surrender his estate to the city for a fair compensation. The act gives no right either to the owner who surrenders, or to the owner who does not surrender, to recover for previous loss or inconvenience.

Nor is the statute made unconstitutional by this construction. It is entitled an act to provide for the prevention and abatement of nuisances and the preservation of the public health. It was not passed to delegate the right of eminent domain, but under the police power of the Commonwealth. Laws passed in the legitimate exercise of this power are not obnoxious to constitutional provisions, merely because they do not provide compensation to the individual who is inconvenienced by them. He is presumed to be rewarded by the common benefits secured. Instances of its exercise are found in all quarantine and health regulations, and in all laws for the abatement of existing and the prevention of threatened nuisances. It has been many times recognized and applied in the decisions of this court. *Commonwealth* v. *Alger*, 7 Cush. 53. *Fisher* v. *McGirr*, 1 Gray, 1. *Commonwealth* v. *Tewksbury*, 11 Met. 55. *Salem* v. *Eastern Railroad*, 98 Mass. 431. *Watertown* v. *Mayo*, 109 Mass. 315. *Dargley* v. *Boston*, 100 Mass. 544. *Cobb* v. *Boston*, 112 Mass. 181. *Commonwealth* v. *Intoxicating Liquors*, 115 Mass. 153; *S. C. nom. Beer Co.* v. *Massachusetts*, 97 U. S. 25.

The Legislature is ordinarily the proper judge of the necessity

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for the exercise of the power, and there is nothing in this case which shows that this act was not required for the preservation of health and protection against a nuisance. The Legislature had the right to delegate to the mayor and aldermen the power to order the owner to fill his land; and, upon his neglect or refusal, to fill it for him at his expense, and to do all that was reasonably necessary to accomplish it.

The owner has availed himself of the option given him by the statute of surrendering his land, instead of having the burden of the expense assessed upon him by the municipal authorities for the suppression of the nuisance; and having elected to avail himself of this option, he must take his compensation according to the provisions of the statute. *Verdict set aside.**

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* A similar decision was made on the same day in Suffolk in the case of

FRANCIS W. WELCH & wife *vs.* CITY OF BOSTON.

PETITION to the Superior Court for a jury to assess damages for the taking, by the respondent, of a parcel of land in Boston, under the St. of 1873, *c.* 340. *Pitman*, J., ruled that damages should be assessed as of the day of the surrender by the petitioners, and not as of the day of the order for filling the land; and that no damages were to be awarded for injuries sustained by reason of the occupation of the land by the city for the filling. To these rulings the petitioners alleged exceptions.

W. A. Field, for the petitioners.

E. P. Nettleton, for the respondent.

BY THE COURT. Both points in this case are settled by the judgment of this court upon the construction of the precisely similar statute of 1872, *c.* 299, in *Bancroft* v. *Cambridge*, *supra*. *Exceptions overruled.*

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ELIZABETH W. PRATT *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Norfolk. Jan. 23. — March 3, 1879. COLT, J., did not sit. AMES, J., absent.

If a corporation issues a certificate of shares in its capital stock, upon the surrender of a former certificate for the same, accompanied by a transfer under a forged power of attorney, neither the person acting under such power, nor the person to whom the certificate is issued, is a necessary party to a bill in equity by the true owner against the corporation to compel it to procure a like number of shares of its capital stock, to record and issue to him a certificate thereof, and to pay him the dividends thereon.

BILL IN EQUITY, filed February 13, 1878, alleging that on June 14, 1869, the plaintiff purchased five shares in the capital stock of the defendant corporation, and received a certificate for the same, numbered 6775, which certificate the plaintiff kept with due care; that on January 11, 1876, an instrument dated January 8, 1876, and having on it the name of the plaintiff as maker thereof, appointing F. W. Brown her attorney to transfer said five shares to Spencer W. Richardson, Edward D. Adams and William H. Hill, Jr., copartners under the name of Richardson, Hill & Company, was presented to the defendant, and at the same time Brown transferred the five shares to Richardson, Hill & Company, and surrendered the plaintiff's certificate of stock; that, at the same time, the defendant issued a new certificate for said five shares to Richardson, Hill & Company; that, by these transactions, the latter contended that they became the legal owners of the five shares; that the defendant refuses to recognize the plaintiff as the owner of said five shares, and to pay her the dividends declared thereon; that the plaintiff had never assigned or transferred her five shares, or any part thereof, in the capital stock of the defendant corporation, or appointed an attorney for that purpose, or in any way authorized a transfer thereof; that she had never assigned or transferred her certificate of stock; that said certificate was not surrendered by the plaintiff to the defendant, but on or before January 11, 1876, it was taken from her possession and custody without her knowledge or consent; that she had never made or delivered to any one a power of attorney to transfer any of her five shares; that

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the power of attorney dated January 8, 1876, appointing F. W. Brown her attorney for that purpose, was not made or signed by her; and that she did not authorize any one to make or sign it, and her signature upon the same was a forgery.

The prayer of the bill was that the defendant might be ordered to procure and transfer to the plaintiff five shares of its capital stock, to issue to the plaintiff a proper and legal certificate for the same, and to make a proper and legal record of the same on its corporate books, and to pay to the plaintiff all dividends declared thereon since January 11, 1876; and for further relief.

The defendant demurred to the bill, because Brown and Richardson, Hill & Company were not made parties thereto. *Ames*, J., overruled the demurrer; and the defendant appealed to the full court.

G. S. Hale, for the defendant.

G. E. Williams, for the plaintiff.

GRAY, C. J. The bill alleges, and the demurrer admits, that, without any negligence or any authority of the plaintiff, a certificate of five shares owned by her in the defendant corporation, having indorsed thereon a forged power of attorney to Brown to transfer the shares to Richardson, Hill & Company, was presented and surrendered by Brown to the corporation, and the shares were transferred by Brown to Richardson, Hill & Company, and that the corporation thereupon issued a new certificate for these shares to Richardson, Hill & Company, who claim to hold the same. The bill does not seek to cancel that certificate, or ask for any relief which may require a decree against Richardson, Hill & Company, or against Brown; but prays that the corporation may procure five shares of its capital stock, and record and issue to the plaintiff a certificate thereof, and pay to her the dividends thereon.

The corporation by its unauthorized and illegal act has clearly made itself liable to the plaintiff; and her right to maintain this bill against the corporation is wholly independent of the questions whether it has also made itself liable to Richardson, Hill & Company upon the new certificate, and whether it can maintain any action against them or against Brown by reason of their having obtained that certificate by means of a forged paper. It was therefore rightly held that neither of them was a necessary

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party to the bill. *Pratt* v. *Taunton Copper Co.* 123 Mass. 110. *Machinists' Bank* v. *Field*, *ante*, 345. *Salisbury Mills* v. *Townsend*, 109 Mass. 115. *Loring* v. *Salisbury Mills*, 125 Mass. 138. *Telegraph Co.* v. *Davenport*, 97 U. S. 369. *Dalton* v. *Midland Railway*, 12 C. B. 458. *Duncan* v. *Luntley*, 2 Macn. & Gord. 30; *S. C.* 2 Hall & Twells, 78. *Taylor* v. *Midland Railway*, 28 Beav. 287, and 8 H. L. Cas. 751. *Decree affirmed*

LEWIS BASS *vs.* JAMES EDWARDS.

Norfolk. Jan. 23. — March 4, 1879. AMES & SOULE, JJ., absent.

If a person owning a lot of land fronting on a highway conveys the rear part of the lot, which is surrounded entirely by the land of persons other than the grantee, the latter has a right of way by necessity to the highway, over the remaining land of the grantor; but the mere fact that the grantor had for a long time used a particular route to the rear land will not justify the implication that he intended to convey a right to this way, and exclude him from assigning any other practical and convenient way to the highway.

If a grantee has a way by necessity over the remaining land of his grantor, and a particular way to the land conveyed has been so used by the grantor before the conveyance, and by the grantee after it, as to amount to a designation of this way as a convenient one, yet, if the grantor obstructs this way, the grantee may go over other parts of the land of the grantor.

A question of pleading not raised at the trial is not open on exceptions in this court, although the bill of exceptions states that the pleadings may be referred to.

TORT for breaking and entering the plaintiff's close, situated on Granite Street in Quincy, on May 17, 1876, and on divers other days and times between that day and September 6, 1877, the date of the writ. The answer admitted the title of the plaintiff to the premises described in the declaration, alleged that the defendant's wife and the plaintiff were children of Lewis Bass, who in his lifetime owned the plaintiff's lot and a lot in the rear thereof, both of which lots, on the death of Lewis Bass, came by inheritance equally to the plaintiff and the defendant's wife; that a partition was made between them, by which the front lot was assigned to the plaintiff and the rear lot to the defendant's wife; that Lewis Bass for more than thirty years before his death had used to pass from the rear lot over and across the front

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lot to Granite Street, and that a passageway was appurtenant to the rear lot over the front lot to Granite Street, for use in the convenient enjoyment, cultivation and care of said rear lot; and that the defendant, acting as the agent of his wife, passed by the said customary way over the front lot, in the necessary care and husbandry of the rear lot, doing no damage save the unavoidable injury of careful passage.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the following facts appeared:

Lewis Bass, the father of the plaintiff and of the defendant's wife, owned a large tract of land on the easterly side of Granite Street in Quincy. In 1844, he conveyed a strip of land running through his estate to the Old Colony Railroad Corporation, by the terms of which the grantee was to build a road underneath the track at a convenient place. His land on Granite Street was thus separated from the land in the rear by the railroad; but was soon afterwards connected with it by a culvert under the railroad.

In 1871, Lewis Bass conveyed the southerly part of the rear land, it being separated from the remainder by a ditch, to his daughter, Mrs. Edwards, by a warranty deed in the usual form, but making no mention of any right of way.

In 1873, Lewis Bass died, and by his will devised a portion of his land on Granite Street to his widow, and the residue of his estate to the plaintiff and Mrs. Edwards in equal shares.

On April 22, 1874, the plaintiff and Mrs. Edwards made mutual deeds of release and quitclaim, by which the plaintiff conveyed to Mrs. Edwards the rear lot, lying easterly of the railroad and northerly of the lot conveyed to her by her father; and Mrs. Edwards conveyed the lots lying between the railroad and Granite Street to the plaintiff. Each of these deeds contained a covenant that the land conveyed was free from all incumbrances made or suffered by the grantor, and also a covenant of warranty against the lawful claims and demands of all persons claiming by, through or under the grantor; and made no mention of any right of way.

At the time of the first conveyance to Mrs. Edwards, the lot was surrounded by the land of other persons, her husband owning a large parcel of land on the east side of both of the rear lots which ran through to School Street.

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While Lewis Bass owned both the rear lots, his mode of access to them was by a walled passageway, about one hundred and twenty-five feet long, leading from Granite Street over land devised by him to his widow, thence over land now owned by the plaintiff, and thence through the culvert to the lot last conveyed to Mrs. Edwards; and, after he conveyed the lot to Mrs. Edwards in 1871, he continued to go to the other lot in the same way. This way was indicated by the tracks of wheels.

During the lifetime of Lewis Bass, the defendant used the same way to cart manure from Granite Street to the lot conveyed to his wife, but also made and used a way to this lot over his own land.

The defendant contended that there was a right of way from the two rear lots to Granite Street over the plaintiff's land, coming out on Granite Street some distance from the walled passageway; and admitted that, as agent of his wife, he used this way in going to and coming from the rear lots, for the purpose of cultivating the land, during the time mentioned in the declaration.

The judge found: 1. That the way through the walled passageway was a way of necessity for the rear lots, and had been used as the only way to these lots from Granite Street for more than twenty years prior to the conveyance of the lot to Mrs. Edwards by her father; and ruled that this established easement or method of use and enjoyment passed with the deed to her from her father.

2. That the same state of facts existed, up to the death of the testator, in regard to the other rear lot; and held that the devise to the widow and to the plaintiff and Mrs. Edwards did not extinguish this right; and that Mrs. Edwards had a right to the use of this way; and had no other right of way attached to either rear lot as a way of necessity.

3. That, prior to the trespasses complained of, the widow of Lewis Bass and the plaintiff had obstructed this ancient way; that the plaintiff had refused to point out or admit any right of way for Mrs. Edwards; and that the way sought to be established would be a reasonable way for both parties, and the most direct and convenient way for Mrs. Edwards, if a new way was to be established without reference to an existing use or way; but

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ruled that neither the acts of third parties, nor the acts or refusal of the plaintiff, had the effect to authorize the defendant to use this new way, as the agent of his wife; and found for the plaintiff in the sum of $25.

The defendant excepted to the ruling of the judge contained in the above paragraph marked "3." By the bill of exceptions, the pleadings might be referred to.

J. Q. Adams, for the defendant.

C. H. Drew, for the plaintiff.

MORTON, J. We find some difficulty in ascertaining from the bill of exceptions the precise question of law intended to be submitted to us. As we interpret it, the Superior Court ruled that Mrs. Edwards, by the deed from her father and by the partition between herself and her brother, acquired a right to a defined and located way, passing into Granite Street through "the walled passageway;" that she had no other right of way over the plaintiff's land, and that, if the plaintiff obstructed and closed this way, she had no right to deviate from it and pass over his land in any other direction.

Her land and the land now owned by the plaintiff were formerly owned by their father, Lewis Bass. In 1871, he conveyed one of the rear lots to Mrs. Edwards. He died in 1873, and by his will devised all of this land of which he was then seised to the plaintiff and Mrs. Edwards. In 1874, they made partition by mutual deeds, by which Mrs. Edwards acquired title to the other rear lot. Both of her lots are separated from the public road by the land of the plaintiff. Neither of the deeds to Mrs. Edwards contains any express grant of a right of way, and, as there is no access to her land, it is clear that she is entitled to a way of necessity over the front land.

It appeared at the trial that Lewis Bass for many years, in going to and from the rear land, had followed the same direction or path, which had become marked by the tracks of wheels. And the plaintiff now contends that this constituted a defined and located way, which was annexed *de facto* to the rear land, and which passed by implication to Mrs. Edwards, and therefore that, as this way furnished access to her land, she had no way by necessity over the front land.

In order to raise an implication that a certain way passes by a

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deed, it must appear that the way was *de facto* annexed to the estate conveyed at the time of the grant, and that it was reasonably necessary to the enjoyment of the estate. *Parker* v. *Bennett*, 11 Allen, 388. *Carbrey* v. *Willis*, 7 Allen, 364. *Buss* v. *Dyer*, 125 Mass. 287. When Mrs. Edwards bought her land, it was necessary for the enjoyment of it that she should have a right of way over the front land to the highway, but there was no necessity that the way should follow this particular route. Equally convenient ways could be used over other parts of the land. The mere fact that the grantor had for a long time used a particular route, adopted because it furnished a convenient approach to his rear land, would not justify the implication that he intended to convey a right to this way so as to exclude his right to assign any other practical and convenient way to the highway.

Upon the facts of this case, we are of opinion that Mrs. Edwards could not claim, by an implied grant, a right to a defined and located way passing to the highway through "the walled passageway," but that she is entitled to a way of necessity over the front land. It may be that the use of this way by the grantor before the conveyance, and by the grantee after, may operate as an assignment or designation of this way as a convenient one, which would deprive the grantee of the right to use any other route while this was unobstructed. If this be so, yet it was a way of necessity, not limited by grant to a particular route, and it is well settled that, if the owner of the servient estate obstructs or closes such a way, the owner of the dominant estate has the right to deviate from the usual way and go over other parts of the land, doing no unnecessary damage. *Leonard* v. *Leonard*, 2 Allen, 543. *Farnum* v. *Platt*, 8 Pick. 339.

We are therefore of opinion that the court erroneously ruled that the defendant, as the agent of Mrs. Edwards, had not the right to pass over the adjoining land of the plaintiff.

The plaintiff now contends that this ground is not open to the defendant under the pleadings, but this point was not taken in the Superior Court, and is not properly before us upon this bill of exceptions. *Exceptions sustained.*

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GEORGE WHITE, Judge of Probate, *vs.* EMILY J. WEATHERBEE, executrix.

Norfolk. Jan. 22. — March 17, 1879. AMES & SOULE, JJ., absent.

After a decree of distribution of an intestate estate in the Probate Court, ordering A., the administrator, to pay a certain amount to B. as administrator of C, and his neglect to obey the order, a surety on A.'s bond, in an action against him thereon for the benefit of B. on account of such neglect, will not be allowed to show that B. was not duly appointed administrator of C.

Under the Gen. Sts. c. 101, § 21, the administrator of the next of kin may bring an action on a probate bond without obtaining leave of the Probate Court.

CONTRACT, brought for the benefit of John Nihen, administrator of the estate of William Nihen, against the executrix of the will of Comfort Weatherbee, upon a probate bond executed to the plaintiff by George M. Cook as principal, and William Jordan and Comfort Weatherbee as sureties, and conditioned for the faithful performance of the duties of Cook as administrator of the estate of Joanna Nihen. Among the conditions was one providing that the principal obligor shall "pay any balance remaining in his hands, upon the settlement of his accounts, to such person as said court shall direct." Writ dated December 29, 1876.

At the trial in this court, before *Gray*, C. J., without a jury, it appeared that Cook and Jordan resided in the county of Suffolk, and this defendant in the county of Norfolk; that Joanna Nihen died intestate, leaving as her next of kin her father, William Nihen, residing in Ireland; that William Nihen, on June 28, 1878, died in Ireland, leaving no assets in this Commonwealth, except his interest in the estate of Joanna; that John Nihen, his eldest son, was appointed in due form, by the Probate Court for the county of Suffolk, administrator of his estate; that by a decree of distribution of the estate of Joanna Nihen, passed by the Probate Court for the county of Norfolk on January 28, 1874, and affirmed by this court on October 24, 1876, a balance of $886.67 was ordered to be paid forthwith to John Nihen as administrator of William Nihen; that he duly demanded this sum of the defendant, and also of Cook, before bringing this action to recover the same; that a similar action was brought at the

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same time, upon the same bond, against Cook and Jordan, in which the plaintiff has since recovered judgment upon default. It also appeared by the records of the Probate Court in Norfolk, that, before bringing this action, John Nihen, as administrator of William Nihen, applied to that court for leave to sue this bond, and such leave was granted; and that the decree granting such leave was made orally on September 6, 1876, and was not reduced to writing until February 18, 1878.

The defendant contended that, upon these facts, this action could not be maintained: 1st. Because the Probate Court for the county of Suffolk had no jurisdiction to grant administration on the estate of William Nihen. 2d. Because the order giving leave to sue the bond was not made in writing before the action was brought. But it was ruled that neither of these objections was sufficient to defeat this action; and, at the defendant's request, the questions thereby presented were reserved for the determination of the full court; judgment to be rendered for the plaintiff for the sum of $911, with interest from February 23, 1878, or for the defendant, as the court should order.

J. R. Bullard, for the defendant.

J. R. Churchill, for the plaintiff.

MORTON, J. The question whether John Nihen was legally appointed administrator of William Nihen is not open to the defendant in this suit.

One of the conditions of the bond in suit is that the principal obligor shall "pay any balance remaining in his hands, upon the settlement of his accounts, to such persons as said court shall direct." It appeared at the trial that the Probate Court passed a decree of distribution of the estate of Joanna Nihen, which, upon appeal, was affirmed by this court, by which a balance of $886.67 was ordered to be paid forthwith to John Nihen as administrator of William Nihen. This was an adjudication in a proceeding in which Cook, the principal obligor in the bond in suit, was a party, which determined not only the amount to be paid, but the person to whom it was to be paid. It necessarily involved the question whether John Nihen was the lawful administrator of William Nihen, who, at the death of Joanna Nihen the intestate, was the next of kin. After this decree was

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passed, it was the duty of Cook, the administrator of Joanna Nihen, to pay the amount named to the person named therein. He could not resist this payment upon the ground that the decree appointing John Nihen administrator of William Nihen was void. As to him this question was *res adjudicata*.

This being so, it is also clear that his sureties cannot raise the question. The obligation which they have assumed is that their principal shall pay any balance in his hands to such persons as the Probate Court shall direct. His failure to make payment according to the decree of the Probate Court is a breach of the administration bond. Such decree is conclusive upon the sureties, and they cannot impeach it collaterally. *Heard* v. *Lodge*, 20 Pick. 53. *Way* v. *Lewis*, 115 Mass. 26. *Cutter* v. *Evans*, 115 Mass. 27.

The other objection of the defendant is, that the action cannot be maintained "because the order giving leave to sue the bond was not made in writing before the action was brought." A conclusive answer to this objection is, that the plaintiff was entitled to bring this suit without obtaining authority from the Probate Court.

The statutes provide for three cases in which suit may be brought upon a probate bond without obtaining leave of the Probate Court: 1st. by a creditor who has recovered judgment against a solvent estate; 2d. by a creditor of an insolvent estate who has obtained a decree of distribution in his favor; and 3d. by "a person who is next of kin to recover his share of the personal estate after a decree of the Probate Court ascertaining the amount due to him." In each of these cases, the claim of the plaintiff is liquidated and ascertained by matter of record amounting to a conclusive judgment between the parties; and nothing remains but payment. It was the intention of the statutes to give any party thus situated the right to sue upon the bond, without obtaining leave of the Probate Court, and to have an award of execution in his favor for the amount due him. Gen. Sts. *c.* 101, §§ 19–29. *Newcomb* v. *Williams*, 9 Met. 525.

If a creditor or a person next of kin dies, his executor or administrator is by law substituted in his place, and succeeds to his rights to maintain an action under the statutes we have

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cited. To hold otherwise would defeat the spirit of the statute by a too strict adherence to its letter.

We are therefore of opinion, that it was rightly ruled that neither of the objections taken by the defendant was sufficient to defeat the action. *Judgment for the plaintiff*

CALVIN SNOW *vs.* INHABITANTS OF ORLEANS.

Barnstable. Jan. 21. — March 3, 1879. AMES & SOULE, JJ., absent.

On a writ of entry, brought in 1877, there was evidence that, in 1850, an academy building, which stood on the demanded premises, was repaired by a person who took charge of the academy as a teacher; that, in the following year, the amount expended by him was raised by a subscription divided into shares of a certain amount each, and the amount paid to him; that the shareholders then took possession of the building and maintained a school in it until 1857, the lot being used as a playground; that, in 1859, the shareholders sold the building, to be removed from the premises, and divided the proceeds; that from that time until 1864 the lot remained vacant, unfenced and unused; that in 1864, with money raised by the contributions of neighbors and former pupils, for the purpose, as declared in the subscription paper, of preserving the place for the benefit of the town, the lot was fenced, and planted with trees; that after this until 1877, when the town erected a library building thereon, the lot was kept in repair by the demandant and others, some of whom were the shareholders above referred to; that in 1877, prior to the date of the writ, the demandant procured deeds from some of the shareholders, which deeds were delivered on the land; and that he so acquired a majority of the shares. *Held*, that there was sufficient evidence to warrant a finding that the demandant had not acquired a title by disseisin. *Held, also*, that the subscription paper of 1864, being signed by the demandant's grantors, among others, was admissible to show that they did not claim title to the land at that time. *Held, also*, that evidence that a person not a subscriber to the subscription paper asked the demandant's permission to make the contemplated improvements was inadmissible in favor of the demandant.

A., purporting to act as agent of the proprietors of an academy, made a deed in which he was so named as grantor, conveying "the academy with the fence around said building." The deed contained personal covenants of warranty on the part of A., and was signed and sealed by him in his own name. *Held*, that the deed was the deed of A., that it conveyed the land about the building, and used in connection with it, as well as the building itself; and that the construction of the instrument was for the court.

On the issue whether a deed to a town of a lot of land, conveyed on condition that a library building should be erected upon it, had been delivered to, and accepted by, the town, there was evidence that the deed after being signed was left with the grantor; that it was acknowledged by him about a month afterwards, and

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recorded twelve days after the acknowledgment; that the town voted to erect the building on the land, and a building committee, appointed by the town, soon after began and have since completed the library building. *Held*, that the evidence was sufficient to warrant a finding that the deed had been so delivered and accepted. *Held, also*, that evidence that the deed was found in the grantor's house, after his death, and that the selectmen of the town had no knowledge of any delivery, was not conclusive in law to overcome the other evidence.

If, when a deed of a person disseised is given, the grantee is in possession, or if the disseisor is then in possession and afterwards abandons it, and the grantee takes possession, the deed conveys a good title.

COLT, J. This is a writ of entry, brought in May 1877, to recover a small triangular lot in Orleans, bounded on all sides by the highway. In 1850, an academy building stood upon it, which in that year was raised up, repaired and improved by one Otis, who then took charge of it as a teacher, and remained in charge until some time in the following year. Otis had no title to the land, and when he went away, the amount expended by him in repairs was raised by a subscription, divided into thirty shares of ten dollars each, and the money paid over to him. He gave no written conveyance of any interest in the land or building to any one, but the shareholders took possession of the academy, and maintained a school in it until 1857, the lot being used for a playground. In 1859, they sold the building, to be removed from the premises, for $200, and divided the proceeds. From that time to 1864, the lot remained vacant, unfenced and unused. In that year it was fenced, planted with ornamental trees, and furnished with a flagstaff. This was done with money raised by the contributions of neighbors and former pupils of the academy, in token, as they declared, of their interest in and love for an institution which had been of such lasting benefit; and for the purpose of preserving the place for the benefit of the town. After this, and until the library building was erected by the town in 1877, the lot was kept in order by the demandant and others, some of whom were shareholders, so called, in the money raised to pay Otis.

The demandant was one of the original shareholders, and at the trial claimed to be the owner of a majority of the shares. He produced deeds from Seabury and Snow, two other shareholders, dated in March and April 1877, which were delivered on the premises. But his right to the land depends upon his having

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acquired title by his own adverse possession and the possession of those whose rights he has obtained since 1857, and he claimed no other title.

The tenant claimed the premises under a deed dated in 1820 from Timothy Doane to John Doane, who by deed executed February 28, 1877, acknowledged in March, and recorded in April of the same year, conveyed the same to the town, upon the express condition, that the building in which Snow's library was to be deposited and kept should be erected thereon. The tenant also, for the purpose of showing title in John Doane, put in a deed to him from Sparrow Horton, dated in 1841.

Against this title by deed in the tenant, the jury must have found that the demandant had acquired no title by disseisin; and there was abundant evidence to justify this finding, on the ground that the demandant had not shown an adverse, exclusive and uninterrupted possession for such time as to defeat the record title of the tenant.

We find nothing, in the rulings and instructions given at the trial, now open to the demandant's exceptions.

The subscription papers of 1864 and 1865, signed by Seabury and Snow, were properly admitted as showing that the relation of those persons under whom the demandant claimed was not that of parties claiming title to the land at that time. And the demandant's offer to prove that a person not a subscriber to the fund asked his permission to make the contemplated improvements, was properly refused, as an offer to prove the act of a mere stranger.

The deed of Sparrow Horton to John Doane in 1841 * does

* This deed was as follows: "Know all men by these presents that I Sparrow Horton, of Orleans in the county of Barnstable, yeoman, agent of the proprietors of the Orleans academy, for and in consideration of the sum two hundred and twenty dollars to me in hand well and truly paid at or before the signing, sealing and delivery of these presents by John Doane of said Orleans, attorney at law, the receipt whereof I the said Sparrow Horton do hereby acknowledge, have granted and sold and by these presents do grant, bargain and sell unto the said John Doane his heirs and assigns forever, the academy situated in said Orleans near the Methodist meeting-house with the fence around said building, with all the privileges and appurtenances to the said academy building, which said academy I hereby convey by virtue of a vote of said proprietors passed at a meeting at said academy on the tenth day of

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not appear to have been improperly admitted in evidence; for although he describes himself as agent of the proprietors of the Orleans academy, yet the deed is sealed with his own seal, and he binds himself and his heirs by the covenants contained in it. It does not appear what title Horton had, and the judge properly ruled that the deed was sufficient in form to convey real estate, and would pass the title of Horton, if he had any, to the academy building, as well as the fence, and the land enclosed by it. It is within those cases where the grant of a house, a barn, a shop, a mill, is held to carry a title to the land under it and necessary to its enjoyment and use. *Greenwood* v. *Murdock*, 9 Gray, 20. Horton is estopped by his covenants at least from claiming any title as against his grantee. *Sumner* v. *Williams*, 8 Mass. 162. *Whiting* v. *Dewey*, 15 Pick. 433. It was not necessary for the tenant to prove that Horton had title to the land, in order to make a recorded deed from him *prima facie* evidence. There was no evidence outside the deed, arising from its application to the subject-matter, which had any bearing on the grantor's intention, and the judge properly ruled that the intention of the parties was to be determined by the contents of the deed only.

There was evidence to show a delivery of John Doane's deed to the town, before the commencement of this action, which was properly submitted to the jury. Delivery is presumed when a deed, executed in presence of a witness, and recorded, is found

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January last past. To have and to hold the said granted and bargained academy and appurtenances to the said John Doane his heirs, executors, administrators or assigns, to his own use, proper benefit and behoof forever. And I the said Sparrow Horton do avouch said proprietors to be the true and lawful owners of the said academy; and have in me full power, good right and lawful authority to dispose of the said academy in manner as aforesaid and I do for myself my heirs, executors and administrators hereby covenant and agree to warrant and defend the said academy, as agent as aforesaid, against the lawful claims and demands of all persons whatsoever unto him the said John Doane, his heirs, executors and administrators or assigns. In witness whereof, I the said Sparrow Horton as agent as aforesaid have hereunto set my hand and seal this twentieth day of February in the year of our Lord one thousand eight hundred and forty one.

Sparrow Horton. [Seal.]

Signed, sealed, and delivered in presence of
David Atwood.

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in the hands of the grantee. *Rotch's Wharf Co.* v. *Judd*, 108 Mass. 224. *Moore* v. *Hazelton*, 9 Allen, 102. In the case at bar, the subscribing witness testified that the deed was not delivered in his presence, but was left with the grantor. The deed dated February 28, 1877, was written by Thomas Doane, who at a meeting held on the fifth of the same month had been appointed one of a committee of the town for building the library building upon this lot of land. It was acknowledged March 23, and recorded April 4, of the same year. In the month last named, the building committee began, and have since completed, the erection of the library building on the premises. There was evidence in this of the assent of the town, by its committee, to the delivery and recording of the deed. A delivery to a register of deeds for the use of the grantee, followed by his subsequent assent, is a good delivery; *Hedge* v. *Drew*, 12 Pick. 141, 145; *Cowell* v. *Daggett*, 97 Mass. 434; even though the assent be not given until after the deed has been lost or stolen. *Powers* v. *Russell*, 13 Pick. 69. *Molineux* v. *Coburn*, 6 Gray, 124. The fact that the selectmen of the town found the deed in the grantor's house, and had no knowledge of its previous delivery, is not conclusive in law to overcome the other evidence of such delivery.

There was evidence that the town had accepted the condi tion contained in the deed. It had voted to erect the building on the land before the deed was made, and, after the deed was made and recorded, erected it there, by their building committee, acting under the authority given. *Springfield* v. *Harris*, 107 Mass. 532.

As to the point that Doane was disseised, and could convey no title to the town, the rule is that the deed of a disseisee conveys no title, which can be enforced in the name of the grantee, against the disseisor, but it goes no further. If the disseisor abandons his possession, and the grantee enters and occupies, and especially if the grantee is in possession when the deed is made, the latter acquires an indefeasible title. *McMahon* v. *Bowe*, 114 Mass. 140. *Farnum* v. *Peterson*, 111 Mass. 148.

Exceptions overruled.

J. M. Day & H. P. Harriman, for the demandant.

G. Marston, for the tenant.

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RUSSELL BLACKWELL & others *vs.* ERASTUS O. PHINNEY & another.

Barnstable. Jan. 22. — March 17, 1879. AMES & SOULE, JJ., absent.

Under the St. of 1866, *c.* 206, allowing the owner of land, appropriated to the cultivation of the cranberry, to erect and maintain a dam across any stream not navigable, for the purpose of flowing land, according to the provisions of the Gen. Sts. *c.* 149, "so far as the same are properly applicable," it is no objection to the recording of a verdict that the jury have awarded gross damages as well as annual damages.

COMPLAINT for flowing land under the St. of 1866, *c.* 206.

At the trial before a sheriff's jury, the evidence tended to show that the complainants' lands were used in the cultivation of cranberries, and that the respondents had flowed the lands for several years during the winter and spring of each year, sometimes drawing off the water in April and sometimes in the early or middle part of May, and on one occasion, within three years prior to the date of the complaint, keeping the water on until May 28, and that they did this in pursuance of a theory of their own as to the method of cranberry culture, the complainants objecting, and contending that their cranberry vines and crops were greatly injured thereby. It also appeared that cranberry vines require cultivation and occasional renewal. The jury awarded past damages, annual damages and damages in gross, and further awarded that the dam be kept open from the twenty-eighth day of May until the first of December in each year.

The verdict was returned to the Superior Court; and the respondents moved that it be set aside; offered to waive and release, in any manner or by any instrument the court might direct or the complainants desire, all right to flow the complainants' lands from that time forward; and asked that the verdict might be so modified as to secure them against paying the damages assessed in gross, and also the annual damages therein named. *Wilkinson*, J., declined to grant the respondents' motions; and ruled that the complainants were entitled to judgment on the verdict. The respondents alleged exceptions.

N. B. Bryant, for the respondents.

J. M. Day, for the complainants.

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ENDICOTT, J. The St. of 1866, c. 206, purports to give to the owner of any land appropriated to the cultivation of cranberries the right to erect and maintain a dam thereon, across any stream not navigable, for the purpose of flowage and irrigation, subject to the terms, conditions and regulations contained in the Gen. Sts. c. 149, commonly known as the Mill Act, "so far as the same are properly applicable." For the purposes mentioned in this act, the respondents erected a dam and flowed the land of the complainants; who instituted these proceedings for the assessment of their damages, as provided in the Gen. Sts. c. 149. The jury returned a verdict, in which they state the sum due the complainants for past damages, and also the sum which shall be paid annually, or in gross, for the damages thereafter occasioned by the dam, as provided in §§ 18, 20–23.

The respondents contend, that, while the jury might properly find the past and annual damages, yet the provisions of the Gen. Sts. c. 149, relating to damages in gross, are not applicable to the case at bar. But we are of opinion that no such distinction can be made. Assuming that the jury are authorized to assess annual damages, it follows that they may assess the damages in gross, which the complainants may take, at their election, in lieu of, or as equivalent to, annual damages, as expressly provided in the sections of the statute above cited. In ascertaining the annual damages to the land of a complainant, which is in the nature of an annuity determinable on the termination of the dam, and is a charge upon the estate in the hands of successive owners, continuing to maintain the dam, the jury are to determine the annual value of the land to the owner, considering the quality of the soil, and generally its productive powers, as if no dam had been erected. *Palmer Co.* v. *Ferrill*, 17 Pick. 58, 67. *Howe* v. *Ray*, 113 Mass. 88. And they are to apply the same rule in determining what sum shall be awarded in gross as damages for the right to maintain and use the dam forever. It is therefore immaterial to what particular use the land was devoted, whether to the cultivation of corn or cranberries, at the time the dam was erected. The party injured is to be compensated for being deprived of the uses to which his land is adapted, by the reason of its quality and productiveness, before the erection of the dam.

Nor is it any reason why gross damages may not be assessed in

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this case, that the respondents are engaged in the cultivation of cranberries, which is an annual crop, that they may discontinue at any time; and that, if compelled to pay gross damages, at the election of the complainants, they could not recover them back on abandoning the cultivation. But this argument would equally apply to gross damages under the Mill Act, if the mill-owner should abandon his dam after paying damages in gross. It is to be presumed, when a person undertakes to exercise his right under the statutes to erect a dam, that he intends to maintain it, and damages are awarded in gross on that supposition. And if he continues to maintain it, when a complainant seeks to enforce the collection of his damages in gross under the Gen. Sts. *c.* 149, § 25, the complainant may have judgment and execution therefor. If he does not intend to maintain it, he should abandon it effectually before that time arrives.

At the hearing in the court below, on the question whether the verdict should be allowed and recorded, the respondents offered "to waive and release, in any manner or by any instrument the court may direct or the complainants may desire, all right to flow the complainants' land from this time forward;" and they asked that the verdict might be so far modified as to release them from paying either annual or gross damages. The presiding judge properly refused so to modify the verdict.

The provisions of the Gen. Sts. *c.* 149, for the payment of past and future damages assessed by a jury, are peculiar. If the complainant is entitled to recover, the jury shall assess the damages sustained within three years preceding the filing of the complaint, and to the time of rendering the verdict; and if the verdict is allowed and recorded, the complainant shall have judgment and execution therefor. § 18. But he is not entitled, when the verdict is allowed and recorded, to have judgment and execution for his annual or gross damages. If he elects to take damages in gross, instead of annual damages, he may do so by complying with the provisions of §§ 21, 22, and it is the duty of the owner of the dam to pay him. If he does not so elect, then he can be paid only the annual damages awarded him, so long as the dam is maintained. § 23. But if the annual or gross damages, as the case may be, are not paid, then the party entitled to them shall have a lien on the premises under § 24, and may

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maintain an action of contract therefor, in which action he may have judgment and execution, the same to be levied on the premises subject to the lien. §§ 25, 26.

In such an action for annual damages, the plaintiff is not entitled to recover, if, during the period for which annual damages are claimed, the defendant has ceased to flow the land of the plaintiff, in pursuance of an express abandonment of all right to maintain a dam. *Fuller* v. *French*, 10 Met. 359. *French* v. *Braintree Manuf. Co.* 23 Pick. 216, 221. *Palmer Co.* v. *Ferrill*, 17 Pick. 58, 67. *Williams* v. *Nelson*, 23 Pick. 141. *Hodges* v. *Hodges*, 5 Met. 205. *Commonwealth* v. *Fisher*, 6 Met. 433. And it is a good defence to such an action brought to recover damages in gross, if the defendant has effectually and seasonably abandoned the privilege, and ceased to flow the land, and paid all damages accruing up to the time of the abandonment. *Hunt* v. *Whitney*, 4 Met. 603.

But, in deciding whether the verdict shall be allowed and recorded, the presiding judge is not bound to try the question, whether, since the rendition of the verdict, the owner of the dam has abandoned his privilege; and cannot be called upon to direct in what form or by what instrument such proposed abandonment shall be made effectual, or require the complainant to do so. If there is no legal objection to the verdict, as rendered, it should be allowed and recorded; the complainant is then entitled to judgment and execution for past damages; and may pursue his remedy by action of contract to recover his annual damages or damages in gross, according as he may have elected, and to such an action the defendant may set up the defence of abandonment. *Exceptions overruled.*

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COMMONWEALTH *vs.* JEFFERSON PRATT.

Norfolk. March 24. — 27, 1879. AMES & LORD, JJ., absent.

A witness, who has voluntarily testified in part on a matter tending to criminate him, cannot afterwards decline to answer a question upon the ground that it will criminate him.

If a married woman keeps intoxicating liquors for sale in violation of law in a hotel hired by her, and her husband aids her in such keeping, or if, without actually and actively aiding her, he is present, and has knowledge of the fact and of her intent, the presumption of law is that she is acting under his coercion, and he can be convicted of such illegal keeping.

COMPLAINT on the St. of 1875, *c.* 99, charging that the defendant, on October 29, 1878, at Milton, kept intoxicating liquors with intent to sell the same in this Commonwealth.

At the trial in the Superior Court, before *Bacon*, J., the government offered evidence tending to show that, on and before the day alleged in the complaint, the defendant was the proprietor of a public house; that, on that day, a quantity of intoxicating liquors was seized in the bar-room, and cellar under the same, in said house; and that the liquors were kept for sale.

The defendant offered evidence tending to show that the whole premises, from January 1, 1878, down to the time of trial, were let to the wife of the defendant; that the business carried on there and the liquors seized were her own; that the clerk of the house was employed by her; and that the defendant to a great extent was engaged in trading horses, and was absent a great part of the time from June 1, 1878, to and including October 29, 1878. The defendant called the clerk as a witness, who testified that he had been clerk since June 1, 1878, hired by and in the employ of the defendant's wife; that she owned the business and liquors seized; that the latter had been bought since June 1; that he had not seen the defendant at any time during that period sell or deliver intoxicating liquors to any person; that the witness had charge, more or less, of the liquors and of the rooms and places in which they were deposited when seized; and that these rooms and places were not used by the defendant and his wife for family or domestic purposes. On cross-examination, the witness was asked by the government if during that period he had sold intoxicating liquors at that house. The witness de-

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clined to answer, on the ground that an answer might criminate him. The defendant also objected; but the judge ruled that the witness must answer; and the witness thereupon answered that he had.

The defendant asked the judge to rule that, if the house and business were owned, carried on by, and under the control of the wife, the defendant would not be responsible for her illegal acts, or those of her agents, although with his knowledge, unless he actively aided or assisted therein; and that he had no right, in law, to interfere to prevent such business, if carried on by her in those parts of the house used exclusively for the business of the hotel. But the judge refused so to rule; and ruled that the government must show that the liquors found on October 29 were kept for sale by the defendant; that if, at the time the liquors were kept for sale by the defendant's wife, the defendant actually aided or assisted her in such keeping, he should be convicted; that if the defendant, without actually and actively aiding his wife in such keeping, was personally present, and knew that his wife was so keeping the liquors, the presumption of law is, that the wife acted under the coercion of her husband, and that he is guilty, and she is not; that this was true, although the place where the liquors were kept was her hotel, and not merely a private dwelling-house; that this presumption might be rebutted by showing that the wife, in fact, acted without the interference or control of her husband; and that, if the defendant directed or advised his wife to keep the liquors for sale, and he was living with her in her hotel, and knew that she was so keeping the liquors, the presumption of law was that she was acting under his coercion, and that he was guilty and she not.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. L. Eldridge, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

By the Court. The witness, having voluntarily testified in part on the matter tending to criminate him, was not entitled to claim his privilege. *Commonwealth* v. *Price*, 10 Gray, 472. The instructions as to the responsibility of the defendant were correct. *Commonwealth* v. *Barry*, 115 Mass. 146. *Commonwealth* v. *Carroll*, 124 Mass. 30. *Exceptions overruled.*

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COMMONWEALTH *vs.* GEORGE A. CULVER & another.

Middlesex. Jan. 1. — April 8, 1879. COLT & ENDICOTT, JJ., absent.

At the trial of a criminal case, if the government offers to prove a confession of the defendant, and the latter objects to its admission, on the ground that it was induced by offers of favor made to him by the officer who arrested him and had him in custody, and the officer is called by the government and denies that he made such offers of favor, and the defendant then offers evidence to prove that he did, it is the duty of the judge to hear such evidence before admitting the confession.

INDICTMENT on the Gen. Sts. *c.* 161, § 12, charging the defendants with breaking and entering, on March 27, 1876, the shop of George M. Crawford, at Ayer, with intent to steal.

At the trial in the Superior Court, before *Allen*, J., the government offered to prove confessions made by the defendants. The defendants objected to their admission, on the ground that they were made in consequence of offers of favor made to the defendants by the officer who arrested the defendants and had them in custody; that these offers were carried to the defendants, by request of the officer, before the confessions were made; and that the confessions were induced by the offer.

At the suggestion of the judge, the government called as a witness the officer who made the arrest; and he denied that he made any offers of favor to the defendants, or had caused any offers of favor to be carried to the defendants by others. The defendants then offered to call five different witnesses to prove the truth of their claim, and asked the judge to hear them, and first to determine whether the confessions ought to be received. The judge declined to admit the evidence at that stage of the case, but admitted the confessions.

The jury returned a verdict of guilty; and the defendants alleged exceptions.

T. H. Sweetser & G. A. A. Pevey, for the defendants.

J. F. Brown, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

LORD, J. The only question which this case presents is, whether it was error in the presiding judge to refuse to hear the evidence offered by the defendants, at the time it was tendered,

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relating to the inducements held out to the defendants for the purpose of obtaining the confessions offered in evidence by the government; and we think it was. There is undoubtedly a large discretion vested in the presiding justice at a trial, in reference to its conduct and to the order of proofs. In this case, when the evidence was offered by the government, it was objected to as incompetent. Its competency was a question of law, and was to be decided by the court. *Prima facie*, it was competent; but the defendants contended that it was incompetent by reason of certain extrinsic facts. It was for the defendants to establish those facts, and it was the duty of the presiding judge to ascertain whether they existed, before admitting the evidence. It appears by the bill of exceptions, that, when the confessions of the defendants were offered in evidence, they objected to such confessions, upon the ground "that they were made in consequence of offers of favor made to the defendants by the officer who arrested the defendants and had them in custody." If this were true, and the defendants could establish the fact, the confessions were incompetent evidence. It was the duty of the presiding judge to determine that fact, upon hearing all competent evidence upon it which was tendered by either party. In the absence of all evidence, the presumption is that a confession is voluntary; and when the party confessing objects that confessions are not voluntary, he is called upon to show, at least, enough to rebut such presumption. Instead, however, of calling upon the defendants thus to repel the presumption, the presiding judge suggested that the officer be called by the district attorney; and he was called, and denied having made offers of favor to the defendants to induce the confessions. The defendants then offered to call five different witnesses to prove the truth of their claim. The court declined to admit the testimony, "at that stage of the case, but admitted the confessions." That, however, was the only stage of the case at which the evidence could be admitted for the purpose for which it was offered, to wit, to show that the proposed confessions were incompetent.

A civil case in which the same principle was involved is *Richardson* v. *Lloyd*, 99 Mass. 475. That was a petition for the review of an action upon the ground of newly discovered evidence. The newly discovered evidence was a paper, which at

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the time of the trial of the action was supposed to be lost, and the respondent had testified to its contents. The petitioner called witnesses, who testified what the respondent had upon the former trial stated to be the contents of the paper. The other party offered evidence in contradiction of such testimony, and offered to prove what in point of fact the respondent had testified the contents of the paper to be. Such evidence was excluded. The court, in sustaining the exceptions, after referring to the fact that the petitioners were bound to establish the truth of their allegations, that the evidence was new and material, and after referring to the fact that the judge heard evidence on one side, and refused to hear evidence on the other, added: "This was error. No fact is legally proved, in judicial proceedings, by parol evidence upon one side only, when competent and proper opposing testimony is rejected."

We are aware that it is not an uncommon practice in the trial of criminal causes, when confessions of a defendant are offered in evidence, and objected to upon the ground that they were improperly obtained, for the presiding judge to allow the confessions, and all the evidence bearing upon the manner in which they were obtained, to be submitted to the jury, either to be rejected by the jury wholly, or to be allowed such weight as under all the circumstances the jury deem it proper to give them. This, however, as we understand it, is rather by consent than otherwise, neither party desiring to take the decision of the presiding judge upon the question of competency. There may be, however, and commonly are, two questions: first, the competency of the evidence, and, secondly, the weight of the evidence; the former is always a question of law, the latter is always a question of fact. The prisoner has always the right to require of the judge a decision of the competency of the evidence; and, even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard it, and to give no weight to it, because of the circumstances under which the confessions were obtained. In the case at bar, however, the counsel for the prisoners insisted upon their right to have the judge decide upon the competency of the evidence, and tendered evidence of its incompetency; this evidence it was the duty of the presiding judge to hear. The evidence having been

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tendered at a stage of the case in which it was the duty of the defendants to offer it, and the presiding judge having refused to hear it at that time, the exception to his refusal to hear it must be *Sustained.*

COMMONWEALTH *vs.* THOMAS J. McDUFFY.

Middlesex. Jan. 8. — April 8, 1879. COLT & ENDICOTT, JJ., absent.

A person, who by false and fraudulent representations obtains from another a sum of money which is no more than is rightfully due him from the latter, cannot be convicted of obtaining property by false pretences, under the Gen. Sts. c. 161, § 54; and, at the trial of an indictment against him on that statute, evidence of the amount of the debt to him is admissible.

INDICTMENT on the Gen. Sts. *c.* 161, § 54, for obtaining money of Cornelius Sweetser by false pretences.

At the trial in the Superior Court, before *Allen*, J., it appeared that, by virtue of an agreement dated October 3, 1872, Sweetser became the trustee of certain funds for Susan R. Howard and her two daughters; that in the fall of 1874, Sweetser, by an arrangement with the *cestuis que trust*, bought a parcel of land in Lowell with a portion of the trust funds, and took a deed thereof in trust for the persons above named.

It also appeared that the defendant was to build a house upon this land, and was to pay all bills for materials used in said house with money which was to be given to him by Mrs. Howard, from time to time, upon the presentation by him to her of bills for such materials; that the money was to be sent to Mrs. Howard at Lowell by Sweetser, from Saco, Maine, where he resided; that the final settlement for the building of the house was made on September 16, 1875; that at that time a draft, drawn by the cashier of a bank in Saco upon a bank in Boston, for $1000, dated November 2, 1875, payable to Mrs. Howard or order, and indorsed by her, was given by her to Sweetser, and by the latter delivered to the defendant, and a certain sum was returned to Mrs. Howard by the defendant, and his bill was thus settled.

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Sweetser testified that he had collected certain notes mentioned in the agreement of trust, and had deposited the money in a bank at Saco with his own funds; that he purchased the draft above mentioned with the funds so held by him in said bank, and sent the draft to Mrs. Howard, and charged upon his book $1000 as paid out from the trust fund; that his purpose in sending the draft was that it might be used to pay for the house, and that the balance, after the payment of the defendant's bill, was to be paid out upon other bills contracted for the house.

The defendant contended, and asked the judge to rule, that, as a matter of law, the money paid to the defendant, at the time of the settlement, was not the money of Sweetser within the allegation of the indictment; but the judge refused so to rule, and the defendant excepted.

The defendant contended that he could not be convicted upon the indictment, because, upon the settlement at which it was alleged he made the false representations set forth, he had been allowed nothing for his services in building the house; that he was entitled to receive for his personal services the sum of $650; and that, if the sum he received in fact was not more than enough to pay him for the bills actually paid and for his services, then he was not guilty of false pretences, even if he had made untrue statements, because he had defrauded no one.

When the defendant was on the witness stand, he was asked what sums he had actually put into the house upon certain bills; but the judge ruled the inquiry immaterial. The defendant's counsel then suggested that it might be important to the defendant to prove that he only received money enough to pay him what he actually paid out, and what was actually due for labor and materials furnished at the time of the settlement. But the judge ruled that, if the defendant actually made false representations as to what went into the house as materials, he might be guilty, even if he had not received more than was due him.

The defendant asked the judge to rule as follows: "1. If the defendant only received, at the time of the settlement with Sweetser, money enough to pay what was actually due him, then this indictment cannot be maintained. 2. If the defendant made representations only for the purpose of getting the

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money due him, and not for the purpose of obtaining money not due him, then this indictment cannot be maintained."

The judge declined so to rule; but ruled that, if the defendant made the false representations for the purpose of obtaining money that he believed to be due to him, and believed that he had a right so to obtain the money, the indictment could not be sustained.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

T. H. Sweetser & G. A. A. Pevey, for the defendant.

J. F. Brown, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

LORD, J. The only question in this case upon which we feel called to give an opinion is, whether the instructions requested by the defendant, or either of them, should have been given.

It is not easy to understand why, in the view of the law as stated by the presiding justice, evidence of the exact amount of indebtedness to the defendant was excluded; for such evidence would be apparently competent upon the issue of the defendant's belief. Nor do we see how the question whether the defendant believed that he had a right so to obtain the money can of itself be a decisive test of his guilt or innocence. We understand the use of the word "right" to signify legal right, and not moral right, although its use might perhaps tend to mislead the jury, and lead them to suppose that, in order to acquit the defendant, he must have believed that he had a moral right to lie and deceive for the purpose of obtaining what was justly due him. We do not, however, decide the case upon any criticism of the particular form of language in which the instruction was given, nor upon any apparent inconsistency between the instructions as given and the rules previously laid down as to the admissibility of evidence.

We understand the broad and naked question to be presented, whether the offence of obtaining property by false pretences can be committed when the party charged obtains no more than is rightfully due him, by whatever fraudulent means or devices he thus obtains it. This leads to an inquiry into the essential elements of the offence. In *Commonwealth* v. *Drew*, 19 Pick. 179, Morton, J., says that to constitute the statute offence four things

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must concur: 1. There must be an intent to defraud; 2. There must be actual fraud committed; 3. False pretences must be used for the purpose of perpetrating the fraud; and, 4. The fraud must be accomplished by means of the false pretences made use of for the purpose. And in *Commonwealth* v. *Jeffries*, 7 Allen, 548, 568, Bigelow, C. J., says that the intent to defraud is part of the substance of the issue, and must be proved.

We are not aware that the precise question now presented has ever been considered by this court; and we have not been able to find any decision in any court of last resort that a party may be convicted of the crime of obtaining property by false pretences, when he has obtained nothing in value which he would not be entitled to as of right.

In *Rex* v. *Williams*, 7 C. & P. 354, C., a servant of B., obtained property belonging to A. by means of falsehood, to enable B. to obtain payment of a debt owed by A.; and it was held that if C. did not intend to defraud A., but only to enable B. to obtain what was due to him, he could not be convicted; and Coleridge, J., in that case told the jury, that, if the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, they ought not to convict, and added, that it was not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the property, but that they must be satisfied that the prisoner at the time intended to defraud the prosecutor.

In *People* v. *Thomas*, 3 Hill, 169, the defendant was charged with obtaining property by false pretences, the fraudulent pretence being that a note of the prosecutor which he had for the amount had either been lost or burned, which was known by him to be false, and afterward he negotiated the note to a third person. The court held that a false representation tending merely to induce one to pay a debt previously due from him was not within the statute against obtaining property by false pretences; the court saying, "A false representation, by which a man may be cheated into his duty, is not within the statute." And in *Commonwealth* v. *Henry*, 22 Penn. St. 253, Woodward, J., makes use of almost precisely the same language.

In *People* v. *Getchell*, 6 Mich. 496, the defendant was charged with procuring the indorsement of the prosecutor to a promis-

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sory note by fraudulently pretending that a former note for the same amount so indorsed was destroyed; and, in his defence, he offered to show that the prosecutor was bound by an agreement with him to indorse for him to an amount larger than both the notes, and that the money obtained on the notes was used for the purposes contemplated by the agreement. It was held that such evidence should be received as tending to disprove the presumption of an intent to defraud.

We are, of course, not to be understood as deciding that a mere pretence of indebtedness by the person from whom the property is obtained is sufficient; nor is anything which we decide to be construed as in conflict with the well-established rule of law that a party is to be presumed to intend all the natural and ordinary consequences of his acts; and fraud and falsehood are always evidence tending to show that the party had a dishonest purpose; and the question for the jury to decide is whether, upon all the facts and circumstances, the defendant had an intent to defraud, and effected that purpose, and whether, in order to accomplish it, he made use of fraudulent representations, and succeeded by means of such representations.

The defendant should therefore have been allowed to offer evidence in support of the facts upon which his prayers are predicated, and the jury should have been instructed that, if proved, the defendant was entitled to an acquittal; and for this reason the exceptions must be sustained.

Upon the other point in the case we make no decision. Under the provisions of the Gen. Sts. *c.* 172, § 12, the indictment might be supported if either the actual or constructive possession of the money, or the general or special property in the whole or any part of it was in the person named in the indictment. We do not think the facts upon this point are so fully and carefully stated in the bill of exceptions as to require us to say, as matter of law, that neither the actual nor constructive possession, nor the general nor special property in the money obtained, was not in Sweetser. That question will be open upon another trial, when the evidence relating to it may be varied, or may be more fully developed. *Exceptions sustained.*

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COMMONWEALTH *vs.* FITCHBURG RAILROAD COMPANY.

Middlesex. Jan. 8.— April 12, 1879. COLT & ENDICOTT, JJ., absent.

If an indictment against a railroad corporation, on the Gen. Sts. *c.* 63, § 98, and the St. of 1871, *c.* 352, alleges, as the only act of negligence, that the servants of the corporation ran a locomotive engine "rashly, and without watch, care or foresight, and with great, unusual, unreasonable and improper speed," evidence is inadmissible to show that the servants neglected to ring the bell on the engine or to sound the whistle.

An indictment against a railroad corporation, on the Gen. Sts. *c.* 63, § 98, charging the killing of a person by reason of the gross negligence and carelessness of its servants while engaged in its business, by running a locomotive engine with great, unusual, unreasonable and improper speed, is not sustained by proof that, at the time of the killing, the engine was run at a high rate of speed, in the absence of evidence that the servants in so doing were acting in violation of their duty.

If a jury has once been empanelled in a criminal case, it is too late to move to quash the indictment for formal defects apparent on its face, although the motion is made before the empanelling of the jury for a new trial of the case, the former verdict having been set aside.

INDICTMENT on the Gen. Sts. *c.* 63, § 98, and the St. of 1871, *c.* 352, to recover, for the use of the widow and children of Charles Keniston, a fine, by reason of the loss of his life, from being run over on May 7, 1874, by a locomotive engine and train of cars of the defendant, at a place in Somerville where the defendant railroad crosses Park Street, so called, at grade.

The first and second counts of the indictment, upon which alone the case was tried, a *nolle prosequi* having been entered as to the third count, are given in full in the report of the case at a former stage, 120 Mass. 372; and the material parts of them are stated in the opinion.

After the former decision, and before the jury were empanelled, the defendant filed in the Superior Court two motions to quash the indictment. *Pitman*, J., overruled the motions. The case was then tried; the jury returned a verdict of guilty; and the defendant alleged exceptions, the substance of which appears in the opinion.

G. A. Somerby & W. S. Stearns, for the defendant.

T. H. Sweetser & O. S. Knapp, (*C. D. Adams* with them,) for the Commonwealth.

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MORTON, J. The first count of the indictment charges the killing of the person named therein, within the city of Somerville, by reason of the unfitness and gross negligence and carelessness of the servants of the defendant while engaged in its business. The negligence alleged is that the servants, who were running an engine, ran it "rashly, and without watch, care or foresight, and with great, unusual, unreasonable and improper speed." The second count varies from the first only in charging that the killing was by a collision at the crossing at grade of a public highway in Somerville called Park Street.

Neither count alleges any negligence of the corporation; neither count alleges as negligence of the servants that they did not ring the bell or sound the whistle as required to do at grade crossings; or that they did not seasonably close the gate at the crossing. Upon these last points, evidence was admitted at the trial, and it was competent upon the issue whether the person killed was using due care; but it was not competent and could not be considered by the jury upon the issue of the gross negligence of the servants of the defendant. The only negligence sufficiently charged is that the servants ran the engine with great, unusual, unreasonable and improper speed. The addition of the words "rashly, and without watch, care or foresight" cannot enlarge the allegation so as to make it equivalent to an averment that the servants neglected to ring the bell or sound the whistle. It does not inform the defendant with reasonable certainty that such negligence is intended to be charged.

It does not follow that the indictment is to be quashed. It contains the substantive allegation that the servants of the defendant ran the engine with unreasonable and improper speed; and no objection to the generality of the allegation having been seasonably taken, if the government can prove that such servants, in violation of their duty, ran the engine at great speed, under circumstances which made such running gross negligence on their part, a verdict of guilty might be justifiable, although such servants rang the bell and sounded the whistle, or although they were not required to do either. But the government is confined in its proofs to the allegations of the indictment, and, having alleged one act of negligence, cannot claim a verdict upon proof of another act not alleged.

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We are thus brought to the question whether, upon such of the evidence in this case as was competent to be considered by the jury, their verdict was justifiable. The bill of exceptions purports to state all the evidence material to the exceptions. Upon a careful examination of this evidence, we find that all the competent evidence merely proves that, at the time of the accident, the servants of the defendant were running the engine at a great rate of speed. All that the evidence shows is that a detached engine was run at a high rate of speed over a crossing at grade of a travelled street in Somerville. But there was no evidence that the speed was greater than was allowed by the rules and regulations of the corporation, and, as evidence that the bell was not rung or the whistle was not sounded was not admissible upon this issue, there was no evidence that the servants in charge of the engine were acting in violation of their duty. In other words, there was no competent evidence of the gross negligence or carelessness of the servants of the corporation.

We apprehend that the real difficulty in this case is that the allegations of the indictment are not adapted to the facts in proof. It fails to allege the neglect to ring the bell or sound the whistle, which appears upon this bill of exceptions to have been the act of neglect of the servants of the corporation, but which, as we have before said, could not properly be considered by the jury upon this issue.

In regard to the defendant's motions to quash, they were both made after a jury had been sworn in the Superior Court, and the objections to the indictment are for formal defects apparent on the face thereof. We are therefore of opinion that they were rightly overruled. St. 1864, *c.* 250, § 1. *Commonwealth* v. *Brigham*, 108 Mass. 457.

As the view we have taken applies equally to the first and second counts, it is not necessary to discuss the question whether there was sufficient evidence of the establishment of Park Street as a public highway. *Exceptions sustained.*

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INHABITANTS OF PLYMOUTH *vs.* INHABITANTS OF WAREHAM.

Plymouth. Oct. 15, 1878. — April 8, 1879. AMES, ENDICOTT & SOULE, JJ., absent.

In an action against a town for supplies furnished J. S., a pauper, the issue was whether J. S. had acquired a settlement in the defendant town, under the St. of 1874, *c.* 274, by paying a tax duly assessed on his poll or estate for three years of the five years of his residence there. It appeared that in one of the three years his name was not on the valuation list, nor on the tax-list made by the assessors and delivered with the warrant to collect the same to the collector; that a clerk of the collector, without authority, and without the knowledge of the assessors until after this action was brought, added the name of J. S. to the list, and he paid a poll-tax to the collector, who paid it into the town treasury. *Held*, that J. S. had not been duly assessed for that year; and that the town was not estopped to deny the same.

CONTRACT for supplies furnished to Daniel McLeod, a pauper, in the years 1875, 1876 and 1877. At the trial in the Superior Court, before *Brigham*, C. J., without a jury, the plaintiff contended that McLeod had acquired a settlement in the defendant town, under the provisions of the St. of 1874, *c.* 274, by residing there for five years together, and paying all taxes duly assessed on his poll or estate for three years within that time.

It appeared that McLeod had lived in the defendant town for five years together, and had been duly assessed a tax upon his poll for the years 1868 and 1870, two of these years, and had paid the same. The facts bearing upon the question whether he had been duly assessed a tax for the year 1869, and had paid the same, are stated in the opinion. The judge found for the plaintiff; and the defendant alleged exceptions.

E. Ames, for the defendant.

A. Mason & A. Lord, for the plaintiff.

LORD, J. The only question raised in this case is whether a poll-tax was legally assessed upon Donald McLeod in the defendant town for the year 1869; or, to state the question more precisely, according to the theory of the plaintiff, Is it competent, upon the facts shown in the case, for the defendant to deny that such poll-tax was duly assessed upon McLeod for that year?

The facts are these: McLeod was duly assessed a poll-tax for 1868 and 1870, which he paid; his name was not placed upon

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the valuation list, nor was any tax assessed upon him by the assessors of Wareham in 1869; the assessors, however, made a tax-list for that year from the valuation list of the year, and a warrant upon such tax-list, dated July 31, 1869, and delivered the same, in a book issued by them, to Alvin Gibbs, collector of taxes of Wareham. In the list so made and delivered to the collector, the name of McLeod did not appear; the assessors had assessed no tax upon him, and had committed none to the collector. The book which was delivered to the collector contained, first, the names of all resident tax-payers, with the amount of the taxes upon polls, and real and personal estate, under the appropriate heads in the form prescribed by law. At the end of such list of resident tax-payers, there followed two blank leaves; after which was a list of non-resident tax-payers, in the usual and appropriate form. On the page following the last-named list, and at the top of it, and after its commitment to the collector, was written the word "Added," and below the word "Added" were written the names of thirteen persons, among which was "McLeod, Donald." The page upon which these words were written had upon the top of it the printed words, "Names," "No. of Polls," and "Poll-tax." Whether those printed words were all that was printed upon the page, and whether they were merely a continuation of a running title which went through the book, does not appear by the bill of exceptions, nor is it material. The name "McLeod, Donald," was written under the printed words at the top of the page, "Names" and "No. of Polls," and under the words printed at the top, "Poll-tax," was inserted against the name of McLeod "$2.00." These entries were written by a clerk of the collector, and on the right-hand leaf was entered a memorandum indicating that said McLeod paid the said poll-tax, less ten per cent discount, on August 31, 1869; and the court found, as matter of fact, that said sum was paid into the town treasury. None of the writing upon that page was upon it when it was delivered by the assessors to the collector, nor was it entered by their authority or consent, nor had they any knowledge of its existence until after the claim was made upon them which is the subject of the present suit; and the claim of the plaintiff is that the money thus collected as and for the poll-tax of McLeod, and paid into the town treasury, is so far a pay

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ment of a tax duly assessed as that the defendant town cannot now say that it was not duly assessed and paid by said McLeod.

It is not necessary in this case to review the authorities or to expound the principles upon which the liability of towns for the support of paupers is fixed within this Commonwealth. This has been very elaborately done by Dewey, J., in *Robbins* v. *Townsend*, 20 Pick. 345; by Morton, J., in *Monson* v. *Chester*, 22 Pick. 385; and by Shaw, C. J., in *Berlin* v. *Bolton*, 10 Met. 115. By these decisions, it is settled that the liability of a town is a strict statute liability, to be fixed by positive rule. The statutes upon the subject are in no sense remedial, and are not to be modified or enlarged by construction or by any apparent equities, and nothing is to be deemed to be within the spirit and meaning of the statutes which is not clearly expressed by their words.

Upon these principles, we are to determine whether a poll-tax was duly assessed upon McLeod by the defendant town for the year 1869. It is perfectly clear that no tax was assessed to him in that year, by the town or by any officer of the town authorized by law to make an assessment, so that the only question remaining is whether the town is estopped to deny that such tax was duly assessed, by reason of the facts that the collector's clerk, without authority, inserted in the book the name of the person taxed and the amount of the tax collected, and that the same was paid into the town treasury. It has sometimes been contended that the omission to tax a person liable to taxation, especially if such omission is for the purpose of preventing the acquisition of a settlement, is equivalent to an actual taxation. The case of *Wrentham* v. *Attleborough*, 5 Mass. 430, is the only case which affords any presumption in favor of such doctrine; but that case has been so many times explained, and criticised, and doubted, that it is unnecessary again to discuss it. It is sufficient to say that, so far as it is supposed to be authority to the point that liability to taxation is equivalent to actual taxation, it is expressly denied by each of the three learned judges in the cases above cited. There can therefore be no pretence that, because McLeod was liable to be assessed for a poll-tax in 1869, such liability is equivalent to actual taxation. The claim in this case is that the defendant town, having received the tax

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into its treasury, is estopped to deny that such tax was duly assessed.

It is a general rule that a party cannot set up, by way of estoppel against another party, any act or declaration, unless by reason of such act or declaration he has been led to do or omit to do something which otherwise he would have not omitted or not done. If, under the decisions before referred to, and the authorities therein cited, there can ever be a settlement acquired by estoppel, it is very clear that such a settlement cannot be so acquired in this case.

The case relied upon to sustain the plaintiff's view is *Charlemont* v. *Conway*, 8 Pick. 408. In that case, the pauper's father was assessed in Conway for state, county and town taxes, for five years during the period from 1797 to 1803 inclusive, and he paid all those taxes, including a town tax for 1798, except the state and county tax of that year. The state and county tax was held to have been illegally assessed, and so, having paid all state, county and town taxes for five years which were legally assessed, he was deemed to have acquired a settlement. The defendant town then proposed to show that all the assessments of taxes during the whole five years were illegal, and the Court of Common Pleas excluded the evidence. Chief Justice Parker, delivering the opinion of this court, sustaining that ruling, said: "It is near thirty years since the last of these taxes was assessed and paid. There has been no call for reimbursement, and none could be sustained at this period." The opinion concludes with this language: "It may be doubted, whether a town can, at any time, set up its own illegal proceedings in regard to taxes, or the misconduct of its officers, after the taxes have been paid, to defeat the settlement gained thereby. But after such a lapse of time as shuts out all claim for reimbursement, we think it clear they cannot."

Giving to this language its full force and effect as applied to the case then before the court, it is clear that the learned Chief Justice intended the remark to apply to the illegality of the proceedings of the town itself, or the misconduct of its officers in the assessment of the tax. In the case at bar, the officers of the town assessed no tax whatever upon McLeod for the year 1869, whether legal or illegal, and the act of the collector's clerk in

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adding the name of McLeod and taking from him the amount of the poll-tax was wholly unauthorized and void. It is true that he paid that amount into the town treasury, but it does not appear, nor is there any reason to suppose that he paid $1.80 to the treasurer of the town specifically as the poll-tax of McLeod; and if that were to be assumed, the town treasurer had no means of knowing whether or not the tax was proper to be paid, and there is no evidence whatever that any officer of the town ever knew that such amount had been paid. It does not appear that the collector himself had any knowledge whatever of the unauthorized act of his clerk. The recent acts of the Legislature, authorizing an assessment of taxes after the time fixed by law, have no bearing upon the question before us, for there is no claim that any such assessment was made, and if the omission to tax McLeod was of such a character as to authorize a subsequent taxation of him, the fact that no application was made for such assessment, and no such assessment was made, tend only to confirm the view that no tax was duly assessed upon him.

It is the duty of the plaintiff town, with the burden of proof upon it, to show every material fact necessary to fix the strict statute liability upon the defendant town; and, having failed to do this, it is not entitled to recover.

The case was argued and has been decided by us upon the assumption that, if a tax of 1869 had been duly assessed and paid, a settlement would have been established under the St. of 1874, *c.* 274, although sufficient facts are not reported to show that such would have been the case. No point, however, having been made upon it, and the case not being before us in that view, the question is a wholly immaterial one, and needs no discussion. *Exceptions sustained.*

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FRANK A. GOELL *vs.* RICHARD MORSE & another.

Essex. Jan. 8. — April 8, 1879. COLT & ENDICOTT, JJ., absent.

If two persons buy a horse, each paying one half of the purchase money, under an agreement that either of them having possession of the horse shall provide for his keeping, without cost to the other, and that each shall offer the horse for sale and endeavor to procure a purchaser at a profit over his cost, but that neither shall sell the horse without the concurrence of the other, they are tenants in common of the horse, and not partners; and if a person who is neither an innkeeper nor a livery-stable keeper, with whom the horse has been placed by one part-owner, sells the horse, by authority of the latter, and without the knowledge or consent of the other owner, retaining out of the proceeds of the sale the cost of keeping the horse, paying the balance to the owner who authorized the sale, and not accounting to the other owner, and with no reservation of his half interest in the horse, it is a conversion of the latter's interest, for which an action will lie against both wrongdoers.

TORT against Richard Morse and Charles J. Willis for the conversion of one half of a horse, with a count in contract for money had and received. Writ dated February 18, 1875. Answer, a general denial. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who found the following facts:

The defendant Willis, before purchasing the horse in question, informed the plaintiff that the horse was for sale for $350, and proposed that the plaintiff should join him in the purchase of the horse on speculation, and, after seeing the horse, the plaintiff agreed to do so. Thereupon Willis purchased the horse on January 11, 1873, and the plaintiff gave Willis $150, and received a receipt therefor. The plaintiff and Willis then agreed that either of them, having possession of the horse, should provide for his keeping, without cost to the other, and that each should offer him for sale and endeavor to procure a purchaser at a profit over his cost, but that neither should sell the horse without the concurrence of the other. Under this agreement, the horse was sometimes in the plaintiff's possession and sometimes in Willis's possession, was advertised and exhibited for sale by them severally, and kept at the cost of each, as he happened to have possession of him. On or about November 7, 1875, the horse, having been placed by Willis in the stable of the defendant Morse in July previous, and the cost of his keeping having become large and beyond the ability of Willis to pay, was sold by Morse by

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authority of Willis for $375, out of which Morse retained the cost of the horse's keeping, and paid the balance, in furniture and cash, to Willis. No part of the proceeds of such sale was paid to the plaintiff, or accounted for to him, and the sale was made without the knowledge or consent of the plaintiff, and without any reservation as to his half interest in the horse. After the sale, and before bringing this action, the plaintiff demanded the horse of Morse, and Morse refused to deliver him. Willis, while he had possession of the horse, expended in his subsistence, shoeing and care, and in advertisements offering him for sale, a sum exceeding the gross proceeds of the sale, and his market value, exclusive of the charges of Morse, who was not, when keeping the horse, an innkeeper or livery-stable keeper, but was a teamster, and kept the horse in a stable with the horses used by him as a teamster.

The defendants asked the judge to rule as follows: "1. Upon the facts, the plaintiff cannot maintain trover against either of the defendants. 2. The facts disclose a partnership between the plaintiff and Willis, to own and hold the horse on joint account for the purpose of speculation, and the plaintiff cannot maintain a count in contract against Willis, without an allegation that the partnership matters had been closed up and an ascertained balance found due. 3. The plaintiff, upon the facts, cannot maintain a count in contract against the defendants jointly, nor against Willis separately. 4. Upon all the facts, the plaintiff cannot, as matter of law, recover upon either count against either defendant."

The judge refused so to rule; found for the plaintiff; and ordered judgment for him for $157.33, being one half of the price for which the horse was sold, with interest from the date of the sale. The defendants alleged exceptions.

C. Sewall, for the defendants.

S. Lincoln, Jr., for the plaintiff.

LORD, J. There can be no doubt of the correctness of the ruling of the Chief Justice of the Superior Court. The plaintiff and Willis were the owners as tenants in common of the horse. The facts show conclusively that the transaction did not constitute a partnership, in reference to the title to the horse. The mode of using and the expense of keeping are conclusive upon

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this point. Being thus tenants in common, neither party had any lien upon the share of the other for expenses incurred, either for labor done upon the horse as by shoeing, or for advertising him for sale, and Morse had no lien upon him for the keeping. *Goodrich* v. *Willard*, 7 Gray, 183. Even if there had been a lien, no steps had been taken to enforce it. The facts find an express agreement that "neither party should sell the horse without the concurrence of the other." The sale by Morse by the authority of Willis was a conversion of the part of the horse owned by the plaintiff. The sale was by the concurrent action of both defendants, and was in itself a conversion without the subsequent demand which was proved.

Exceptions overruled

CHARLES SALOMON *vs.* ASA S. HATHAWAY & others.

Suffolk. March 27. — April 2, 1879. AMES & LORD, JJ., absent.

No exception lies to the refusal to give a ruling based on facts not appearing in the bill of exceptions.

In an action of replevin, if it appears that the goods in question were sold on condition that the purchaser should give a note for the price, that, though requested, he neglected for three days to give the note, and that the seller did not waive the condition, these facts will warrant the conclusion that the purchaser never acquired any title in the goods, and had no right to retain them against the seller; and, in such case, no demand for a return of the goods is necessary.

REPLEVIN of a quantity of cigars. Answer, a general denial. At the trial in the Superior Court, before *Putnam*, J., without a jury, the following facts appeared:

The plaintiff did business in New York, and the defendants were members of a firm doing business in Boston. The cigars in question were sold to the defendant Hathaway by one Frasier, an agent of the plaintiff; the sale was on condition that the cigars should be sent to the defendants for examination, and if they proved satisfactory the defendants should give a note on four months' time in settlement of the bill. The goods were forwarded with a bill of them amounting to $450; and arrived in Boston on August 24 or 25, 1877. Frasier called at the

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defendants' store on Friday, August 25, and requested the note of one of the firm, who replied that the other partner, Jacobson, was out of the city, but would return on Saturday, when he would examine the cigars, and, if they were satisfactory, would give the note.

Frasier testified that, on Sunday, August 27, Mitchell called on him and told him that Jacobson had been ordering goods largely in New York, which they were unable to pay for; that a draft from New York for $800 had been returned on that day; that a note to the plaintiff, given in payment of cigars previously purchased, would fall due on the following Tuesday, and would not be paid; that there was some trouble between the partners, and that he advised the witness to watch his cigars; that the witness telegraphed to the plaintiff to come to Boston, and went himself to the defendants' store, on the next day, Monday, and watched the cigars all day; that they remained in the original cases in which they arrived, excepting that one sample box had been taken out of each case and lay on top of the case; that on Monday Jacobson also told him that there was trouble between the partners; and that on Tuesday the plaintiff arrived from New York and replevied the cigars. Jacobson testified that on Saturday, when he arrived home, his attention was called to the cigars; that he opened the cases, took out samples and examined them; and that he told Mitchell they were satisfactory, and to settle for them. There was no evidence that any demand was made for a note after the conversation with Mitchell on Sunday.

Upon this evidence, the defendants asked the judge to rule that, if Mitchell and Frasier had the conversation on Sunday testified to, and Mitchell then suggested that Frasier should make an attachment on the goods of the firm, and Mitchell told Frasier there was trouble between the partners, and that he would like to have the firm closed up, and suggested that way to do it, and afterwards Frasier did replevy the cigars, and they had been previously accepted and Mitchell was authorized to settle for them, and the reason why they were not settled for and the note not given was in consequence of this suggestion of Mitchell, then, if the sale was a conditional sale, the condition was waived.

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The judge declined so to rule; but found that the sale and delivery of the cigars was conditional upon the defendants' giving a note on four months' time; that such condition had not been waived by the plaintiff; and that the condition had not been complied with, and no title vested in the defendants.

The defendants also asked the judge to rule that, upon the evidence and facts found, the plaintiff could not sustain his action. The judge refused so to rule; and found for the plaintiff. The defendants alleged exceptions.

J. F. Brown & M. H. Swett, for the defendants.

W. C. Williamson, for the plaintiff.

GRAY, C. J. The defendants' first request was rightly refused, because it assumed facts of which there was no evidence, and asked for a ruling in matter of law upon what was a question of fact. The judge, before whom the case was tried without a jury, found, as matters of fact, upon evidence which is not shown to have been insufficient in law, that the sale from the plaintiff to the defendants was conditional upon their giving a note on four months for the price, that the defendants, though requested, neglected for three days to give the note, and that the plaintiff had not waived the condition. These facts warranted the conclusion that the defendants never acquired any title in the goods, and had no right to retain them against the plaintiff. If such was the case, no demand for a return of the goods was necessary before suing out a writ of replevin. The judge therefore rightly refused to rule that, upon the evidence stated and the facts found, the plaintiff could not sustain his action. *Hill* v. *Freeman*, 8 Cush. 257, 260. *Farlow* v. *Ellis*, 15 Gray, 229. *Hirschorn* v. *Canney*, 98 Mass. 149. *Exceptions overruled.*

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JOHN B. REGAN *vs.* AARON C. BALDWIN.

Suffolk. Nov. 12, 1878. — April 8, 1879. COLT, MORTON & SOULE, JJ., absent.

A lease of a shop provided that the lessee should pay a certain rent, except in case of fire, and should keep the premises in repair, damage by fire excepted; that in case the demised premises should be damaged by fire, so as to be rendered unfit for use and habitation, the rent, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, should be abated or suspended, until the premises should be put in proper condition for use and habitation by the lessor. During the term of the lease, the shop was injured by fire, so as to be unfit for use; the lessor did not repair for a certain time, refused to abate the rent, and demanded full rent of the lessee, which he paid under protest. *Held*, that the lessee had no cause of action against the lessor.

CONTRACT. The declaration alleged that the plaintiff and the defendant executed an indenture, whereby the defendant leased to the plaintiff the lower floor of a building on Essex Street in Boston, and the cellar under the same, for the term of ten years from October 1, 1867; that by the terms of the lease, a copy of which was annexed, the defendant was to pay the plaintiff a certain rent monthly, "except only in case of fire or other casualties," and to keep the premises in repair, "reasonable use and wear, and damage by accidental fire or other inevitable accidents only excepted;" that the lease also contained the following clause: "Provided always, that in case the premises, or any part thereof, shall, during said term, be destroyed or damaged by fire, or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinafter reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall be thereby determined and ended at the election of the said lessor or his legal representatives."

The declaration further alleged that the building on the premises was burned and injured by fire on May 30, 1878, and the store and cellar, leased to the plaintiff, rendered unfit for use and habitation; that the cellar was not put, by the lessor, in suitable condition and repair for occupancy, use and habitation for the

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space of one year and longer; and the defendant, though often requested, refused to do so; that the lease was not determined and ended by the defendant, or by any other person having authority so to do; that the plaintiff had kept and performed the covenants and agreements on his part to be kept and performed, and that the defendant has not kept and performed his part of said indenture; that the defendant refused to abate and suspend said rent, or a just and proportionate part thereof, but exacted of, and the plaintiff has been obliged by the defendant to pay, the rent in full, as reserved in said indenture, which the plaintiff did under protest, in order to save his estate and business.

The defendant demurred to the declaration, assigning as cause of demurrer that the matters therein set forth were insufficient to enable the plaintiff to maintain the action.

The Superior Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiff appealed to this court.

P. A. Collins, for the plaintiff.

E. W. Hutchins, for the defendant.

LORD, J. In this case the demurrer was properly sustained. The plaintiff's declaration sets forth no cause of action which entitles him to recover. The amount which he seeks to reclaim was a sum which he voluntarily paid; he paid it under no mistake of fact, and it has long been held that money so paid cannot be recovered back.

There is an early case, *Moses* v. *Macpherlan*, 1 W. Bl. 219, in which it was held that money paid, even under a judgment of a court of competent jurisdiction, could be recovered back, if in equity and good conscience the party receiving it was not entitled to hold it. In that case, the plaintiff had indorsed a promissory note, and, at the time of the indorsement, it was agreed between himself and the indorsee that the latter should not look to him for payment, but should rely wholly upon the obligation of the maker. Suit, however, was brought against the indorser, and it was held by the court that the parol collateral agreement made at the time of the indorsement could not be given in evidence in bar of a suit upon the indorsement, and judgment was rendered against him, which judgment he satisfied. He then brought his action upon the parol agreement to recover the amount which he had thus paid contrary to such agreement, and it was decided

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that the action could be maintained. Lord Mansfield in giving his opinion says that the agreement was properly rejected in the former suit, and judgment properly rendered therein; but that, the parol agreement having been made, the party received payment of the note when in equity and good conscience he ought not to have received it, and that, in the equitable action for money had and received, the plaintiff should be entitled to recover back the amount paid which equitably the plaintiff in the former suit had no right to demand.

That decision, however, was never deemed satisfactory; and, although the courts for a long time struggled to sustain the principle upon which it was based, that money paid to a party, who in equity and good conscience ought not to hold it, might be recovered back, yet the decision itself has never been regarded with approbation, and the limitation has come to be fixed that a party may in equity and good conscience continue to hold money voluntarily paid to him under no mistake of fact, and without fraud upon his part. This rule was established in *Brisbane* v. *Dacres*, 5 Taunt. 143, and from that time to the present that decision has been recognized and followed. It was distinctly recognized by Chief Justice Shaw in *Bacon* v. *Bacon*, 17 Pick. 134, and by the court in *Forbes* v. *Appleton*, 5 Cush. 115. And in *Benson* v. *Monroe*, 7 Cush. 125, 131, Mr. Justice Metcalf says: "The court deem this a plain case. It is an established rule of law, that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money, as paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust." Commencing with the case of *Brisbane* v. *Dacres*, before cited, he then proceeds to review the English authorities from that time forward in which the doctrine has been acted upon, and refers approvingly to the expression of Lord Kenyon in *Brown* v. *M'Kinally*, 1 Esp. 279, that to allow such an action "would be to try every such question twice."

The fact that the plaintiff in this case might have been under embarrassment as to the amount of rent which he should withhold, or which he might properly claim to rebate, does not affect the principle. It was his right to litigate that question with his

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lessor, and his election to pay the full amount rather than to resist the payment of any portion of it makes the payment a voluntary one. It is not necessary to consider whether the plaintiff would have been entitled to a cross action had the lease contained an express covenant to keep the premises in repair, for the lease contains no such covenant, and the law raises no implied promise to do so. The lease is in the form long used in this Commonwealth, which requires the lessee himself to keep the premises in such repair as he receives them, (reasonable use and wear, and damage by accidental fire or other inevitable accident only excepted,) with the right, commonly reserved in such leases, to have deducted from the rent a reasonable amount, if he is deprived of the use of the premises by such casualty.

Judgment affirmed.

PATRICK KENNEY *vs.* JOHN B. INGALLS & others.

Suffolk. Nov. 13, 1878. — April 8, 1879. COLT & MORTON, JJ., absent.

An assignee in bankruptcy has no better title than the bankrupt, except in goods conveyed in fraud of creditors.

If goods are sold on the condition that they shall be paid for by the promissory note of the purchaser "satisfactorily indorsed" by a third person, the taking of the note by the seller without indorsement, on the promise of the purchaser that the indorsement should be furnished, and making no subsequent demand for such indorsement, and failure to return the note, do not, as matter of law, amount to a waiver of the condition.

REPLEVIN of five cases of felt cloths. The writ, dated September 7, 1877, was originally brought against the defendant Ingalls alone, who attached the goods as a deputy of the sheriff of Suffolk, on a writ against John A. S. Graves and Wyman E. Abercrombie, copartners, doing business under the name of Graves & Abercrombie. Graves & Abercrombie filed a petition in bankruptcy on September 11, 1877, and their assignees were allowed to become parties defendant.

At the trial in the Superior Court, before *Putnam*, J., the jury returned a verdict for the plaintiff; and the assignees

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alleged exceptions, the material parts of which appear in the opinion.

E. P. Brown, for the assignees.

S. J. Thomas, for the plaintiff.

LORD, J. There was no error in the ruling of the presiding judge which was prejudicial to the defendants.

There does not appear to be any substantial difference between the real parties to this controversy as to the facts out of which it arises. It is agreed by both of them that there was to be a sale by the plaintiff to Graves & Abercrombie of the goods replevied, and that they should be paid for by the note of Graves & Abercrombie, satisfactorily indorsed by a third party. The plaintiff's agent uses the language in his testimony that the sale was upon "these conditions." Graves, the purchasing party, does not use the word "condition," but instead thereof states that the sale was upon the understanding that such indorser was to be furnished; "that this was the understanding between them always, all the way through, and at the time when the note and receipts were given; that afterwards they found themselves in difficulty and could not get the indorsement."

The purchasers failed in business within a very few days of the transaction, and, within three weeks of the purchase, filed their petition in bankruptcy, and the present defendants were duly chosen their assignees, and contend that the property, as the property of Graves & Abercrombie, vested in them by force of the assignment in bankruptcy. Under these circumstances the question arises as to the rights of the assignees in the property in question.

The recent case of *Dugan* v. *Nichols*, 125 Mass. 43, following the decision of *Donaldson* v. *Farwell*, 93 U. S. 631, decides that the assignee takes only the estate of the bankrupt, and that, "if the property has not been conveyed in fraud of creditors, the assignee has no greater interest in or better title to it than the bankrupt."

There is no element of fraudulent conveyance in this case, and the precise question is who, as between the plaintiff and Graves & Abercrombie, is entitled to the property. No question arose as to the revocation of a sale which both parties understood to be complete, and therefore no question could arise

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as to whether the revoking party had put the other in the same condition as before the sale. The transaction as agreed by all was still inchoate. The view taken by the presiding judge, that the sale might be deemed to have been a conditional sale, was quite as favorable to the defendants as the facts warranted.

The defendants, however, requested the judge to rule, and now contend, as matter of law, that the condition had been waived by the plaintiff, and that the sale had become absolute. Whether there has been a waiver is to be determined by the jury upon the facts proved. There may be such a state of facts that the court would be called upon to instruct the jury, as matter of law, that there had been a waiver. Ordinarily, however, the question of waiver involves so much the intention and purpose of a party, which are to be inferred from facts proved, that it is necessary to submit the question to a jury. In the present case, the presiding judge had certainly no authority to tell the jury, as matter of law, that the facts proved showed conclusively a waiver of the condition. The phrase used by Graves, that that was the understanding "all the way through," must mean that such understanding existed from the time of the purchase to the time of their bankruptcy, and up to the time when "they found themselves in difficulty and could not get the indorsement." The plaintiff's agent testified that, on September 3, he called upon Graves for the indorsed note. Graves replied that he was very busy and was unable to see the party that day, but wrote a promissory note, handed it to the agent, and said, "Bring it in in a day or two and I will have it indorsed," and two days afterwards, on September 5, he learned that Graves & Abercrombie had suspended payment, from the fact that the teamster brought back five cases of goods undelivered, the whole number of cases bargained for being twenty-five cases, eleven of which had been delivered prior to the five cases which were thus returned; and the only act in relation to the subject which appears to have been done by the plaintiff's agent, after learning of the suspension, was to telegraph to the plaintiff at Providence and wait until the plaintiff came to Boston; he sued out a writ of replevin which by its date was on September 7, and served on September 8. It was certainly sufficiently favorable to the defendants to submit to the jury, upon such facts, the question whether there had been

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a waiver of the condition. It appears by the bill of exceptions, also, that the presiding judge instructed the jury "fully as to what constituted a conditional sale, and how the condition might be waived, which instructions were not excepted to."

The bill of exceptions states further, that the judge then read to the jury the assignees' requests for instructions, and instructed them that all the facts stated or alluded to in the requests were proper subjects for them to consider in determining the question; but inasmuch as no specific ruling is stated, nor any exception taken to any specific ruling, the only question which we can pass upon is whether the requests, or any one of them, should have been given in the words stated; and there is no one of the several requests which the presiding judge might not properly modify, and which we must presume he did modify in the full instructions which he gave upon the question how the condition might be waived.

The first instruction requested is not applicable to the facts of the case, and the others seem to us to present but two questions of law: first, whether the failure to return the note which the plaintiff received without indorsement is in law conclusive evidence of a waiver of his right to an indorser; and second, whether the taking of the note without an indorser upon the promise that one should be furnished, and making no subsequent demand for an indorser, is conclusive evidence in law of a waiver of the right to such indorser. Certainly neither of the propositions can be maintained. The circumstances under which the note is taken, the object and purpose of taking it, the facts and circumstances immediately transpiring, the condition and standing of the parties, the knowledge of the purpose of Graves to furnish such indorser all the way through, the fact that he became unable to procure an indorser so immediately after the promise, the knowledge of the plaintiff of that fact, and many other circumstances which might have influenced the conduct of the plaintiff, were all proper to modify and qualify the acts of the plaintiff and the effect of such acts; and it would have been improper for the presiding judge to have stated to the jury that a single naked act, thus susceptible of explanation and qualification, must be deemed in law an actual waiver of his right.

Exceptions overruled.

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EDWIN S. SPAULDING, executor, *vs.* INHABITANTS OF ARLINGTON.

Middlesex. Jan. 8, 9. — April 8, 1879. COLT & ENDICOTT, JJ., absent.

The St. of 1871, *c.* 245, authorized a corporation to take land for the purpose of supplying the inhabitants of a town with pure water, directed that a description of the land so taken should be filed in the registry of deeds within sixty days from such taking, provided a mode of compensation to the owners of land so taken, and authorized the town to purchase the franchise of the corporation. The St. of 1873, *c.* 242, ratified the purchase by the town of the franchise of the corporation, and contained provisions similar to those above stated. In 1872, the town entered upon and flowed a parcel of land, assuming to act under the St. of 1871, but filed no description of the land taken until after the passage of the St. of 1873. After the filing of the description, the owner of the land taken filed a petition under the St. of 1873, and was awarded damages, but the tribunal, on the objection of the town, refused to admit evidence of the damages sustained by him prior to the filing of the description. *Held*, that he was entitled to recover such damages, under the petition, and that he could not afterwards maintain an action of tort therefor.

LORD, J. This is an action of tort, brought by the plaintiff, as executor of the will of Charles Harrington, to recover damages for injury done to the testator's land by flowing the same, in the summer of 1872; and the question presented for our consideration is, whether the entry upon the land was a lawful entry for the purpose of supplying the town of Arlington with water, as authorized by the Legislature, and to be compensated for under the provisions of the acts authorizing the entry; or whether the entry was tortious, damages for which are recoverable in this action.

It appears by the bill of exceptions that the town of Arlington, on July 8, 1873, filed a location or taking of lands for the purpose of collecting and securing a supply of pure water for the inhabitants of the town of Arlington, which location included the land of the plaintiff's testator to which the alleged injury was done. The several acts under which the defendant town claims to have taken the land provide a mode in which compensation can be obtained by the owner of land so taken, and for the recovery of all damages that shall be sustained by any person "by the taking of any land, water, or water-rights, or by the constructing of any aqueducts, reservoirs or other

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works for the purposes aforesaid." Sts. 1871, c. 245, § 4; 1873, c. 242, § 4.

It appears further, that, under and by virtue of such provision, the present plaintiff applied to the Superior Court for an assessment of damages sustained by his testator, and upon due proceedings such damages were assessed. He contends, however, that such damages embraced only the value of the land on July 8, 1873, and the injuries subsequently sustained by reason of such taking upon that day; and that, inasmuch as the injury complained of in this action was done in the summer of 1872, and before the passage of the St. of 1873, under which he contends that the town acted, the damages sued for in this action were not properly recoverable under that proceeding, and that, such entry before the statute being wholly unauthorized, damages therefor can now be recovered in an action of tort. It further appears, that at such hearing he tendered evidence of the injury which he now sues for; that such evidence was objected to by the defendant town and rejected; and that the presiding judge, on the trial of this case, against the defendant's objection, instructed the jury, "that, if they found it to be true that said commissioners did not have evidence before them of said entry and the damages therefor, the judgment in said action is not a bar to the plaintiff's recovering in this action."

Strictly speaking, in form at least, the issue thus presented was an immaterial issue. The question, whether a judgment in one proceeding is a bar to another proceeding between the same parties, does not depend upon the question whether particular evidence was admitted, but depends upon the question whether the same issue was necessarily involved in the former proceeding as in the subsequent. Such issue may be involved, although no evidence was offered upon it. If, however, the ruling was technically wrong, but no injustice was done to the defendant by it, the court would not therefore feel obliged to order a new trial. This leads to the inquiry whether in the former proceeding the precise question which is in issue in this case was necessarily involved.

By reference to the legislation upon this subject, it will be seen that, by the St. of 1871, c. 245, the Arlington Lake Water Company was authorized to supply the town of Arlington with

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pure water, and for that purpose to purchase or otherwise take land, water, or water-rights necessary for its accomplishment; and section 6 of that act provides that "the town of Arlington may, at any time after the passage of this act, purchase of said corporation its franchise and property, in the manner provided in chapter ninety-three of the acts of the year one thousand eight hundred and seventy." Between the passage of that act and the St. of 1873, *c.* 242, the town of Arlington had exercised this right of purchase, as appears by § 1 of the St. of 1873, which commences as follows: "The purchase of the franchise, property, rights and privileges, of the Arlington Lake Water Company, by the town of Arlington, and the transfer and conveyance thereof by said corporation to said town, is ratified and confirmed." It does not appear at what precise time such purchase was made. Inferentially, however, it does appear that it was made before the trespass complained of. The bill of exceptions states: "The plaintiff contended that the defendant entered upon the lands, damage to which is sued for, on or about the first of June, 1872, under the St. of 1871, *c.* 245, and so entered upon it by flowing it at this time, and afterwards by building a dam, but did not file in the registry of deeds any certificate of the taking of the land at that time, but did file a certificate, hereinafter set forth, of the taking of said land on July 8, 1873, and put in evidence tending to show the above facts." It thus appears that, when the town did the acts complained of, it did them claiming to act under the law, and as authorized by the law. The plaintiff, however, contends that the omission to file a location within sixty days from the time of so entering upon and taking the land avoided the legality of the act, and made the town a trespasser *ab initio*. In the view we take of the matter, we are not called upon to decide whether the provision as to the filing of the location is merely directory. It is certain, at least, that the plaintiff had the right to deem the taking to have been by authority of law, and to apply for an assessment of damages immediately upon the taking, and without reference to the question whether any location was filed. *Tower* v. *Boston*, 10 Cush. 235. The St. of 1873, confirming the purchase of the franchise of the Arlington Lake Water Company, contains also this provision: "And the acts of said town, and of its officers and agents, in execution of the purposes of this

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act and of the acts to which this act is in addition, so far as the same may appear to be invalid from any want of authority on the part of said town, are authorized, ratified and confirmed."

We can have no doubt that all the proceedings of the town are to be taken to have been under and by virtue of the authority conferred by law. The provision of § 3 of the St. of 1873, that "said town shall, within sixty days from the time of taking any land as aforesaid, file in the registry of deeds for the southern district of the county of Middlesex, a description of the land so taken, sufficiently accurate for identification, and state the purpose for which it is taken," is, like many other provisions of the act, in its nature curative; and when filed, it fixes the liability of the town for all the damages which accrue to parties from the commencement of the enterprise. In *Tower* v. *Boston*, *ubi supra*, the right of the defendant to enter upon and use lands preliminary to the taking of the same, and the use of lands proper for that purpose, which are not described in the final location, are distinctly recognized; and the only claim which the party whose lands are so entered upon has for compensation is under the provisions of such act, and no action of tort can be maintained therefor.

The objection that the St. of 1873, thus construed, takes away the right of the plaintiff which was vested in him by the failure to file a location within sixty days, cannot prevail. It takes away no right. It simply changes the remedy; and it will be observed that the remedy provided by the St. of 1873 is widely different from the remedy provided by the St. of 1871. By the St. of 1871, the remedy is to be such as is provided by law in respect to land taken for highways. By the St. of 1873, the remedy is by application to the Superior Court for the appointment of commissioners to assess the damages, with the right in the dissatisfied party to claim a jury. There is no vested right in any person in any particular remedy, but remedies are subject to be modified or changed by the Legislature. The plaintiff, having proceeded upon the remedy provided by the statute, had the right to cause all the damages sustained by his testator, whether in taking land or in injuring land not taken, to be assessed. Every damage, therefore, sustained by him, by reason of the taking, was directly in issue before that tribunal. If

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any proper element of damage was excluded by such tribunal, his remedy was, first, by petition for a jury, and, if before a jury evidence of such claim was rejected, by exceptions to this court. The mere fact that evidence competent upon the issue was rejected is no ground for another suit for additional damages. We think, therefore, that the whole extent of his claim for damages, by reason of any and of all acts done by the town in prosecuting their work, has once been tried, and that the present action cannot be maintained. *Exceptions sustained.*

T. H. Sweetser & J. H. Hardy, for the defendant.

C. Robinson, Jr., for the plaintiff.

CITY OF CAMBRIDGE *vs.* CHARLES MUNROE.
SAME *vs.* MARGARET EMERY.
SAME *vs.* PATRICK MCGURK.
SAME *vs.* JOHN MCGURK & another.

Middlesex. Jan. 15, 1878. — Jan. 11, 1879. Jan. 23. — April 10, 1879.
ENDICOTT & SOULE, JJ., absent.

The St. of 1872, c. 299, entitled "An Act to provide for the prevention and abatement of nuisances, and the preservation of the public health, in the cities of Cambridge and Somerville," authorizes the respective boards of mayor and aldermen in these cities to establish a grade not less than thirteen feet above mean low-water mark, and provides that such board may order the owners of lands below that grade to raise the same to such grade, and that, in case the owner of any such lands fails to comply with such order, within a certain time, the board of mayor and aldermen may raise the grade, and the expense incurred thereby shall constitute a lien on the land, "as is provided by law for the collection of taxes upon real estate, and in case of land sold for taxes." *Held*, that, after the passage of the act, although the mayor and aldermen constituted the board of health, they could not, under the Gen. Sts. c. 26, acting as such board, order a tract of such land to be filled by the owners thereof, and, on their neglect to fill it, cause the same to be filled; and that the city could not maintain an action of contract for the expense incurred thereby.

FOUR ACTIONS OF CONTRACT. The declaration in each case alleged that the defendant was on May 12, 1874, and had since been, the owner of a lot of land in Cambridge, described by metes and bounds; that, on the day above mentioned, said lot

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was, and, until the filling hereinafter named, continued to be, a source of filth, a cause of sickness and a public nuisance, injurious to the public health; that, on the day above mentioned, it was duly adjudged by the board of health of the plaintiff city to be a public nuisance, injurious to the public health, and said board, by a written order, duly ordered the defendant at his own expense to remove said nuisance on or before a time therein named; that this order was duly served upon the defendant, and he had actual notice thereof; that the defendant wholly failed to comply with the order, and thereupon, after such failure, the board caused the nuisance to be removed, and, in so doing, and for that purpose, the plaintiff expended in filling such land a sum named; that the plaintiff has duly demanded the same of the defendant, but the defendant has wholly neglected and refused to pay the same or any part thereof. Writs dated June 21, 1875.

The answer in each case contained a general denial; and averred that, if any such nuisance or filth ever existed, it was not occasioned by the defendant's default, neglect or act, but that the plaintiff and its board of health caused such nuisance and filth to accumulate on the premises, to the injury of the defendant.

At the trial in the Superior Court, before *Brigham*, C. J., without a jury, the following facts appeared:

In 1874, the defendants and others presented a petition to the board of aldermen of the plaintiff city, praying the board "to cause to be abated the nuisance that does now and has existed since the filling in of the land and territory known as West Dock caused by an order from the city of Cambridge under the grade law passed by the Legislature of 1872." This petition was, on March 4, 1874, referred to the board of health, and on May 12, 1874, that board passed the following order: "Ordered, That the several owners thereof be directed, at their own expense, and within twenty days from the service of an attested copy of this order upon them, to abate the nuisance upon the premises owned by them respectively, and situate on Hampshire Street and Webster Avenue, between Portland Street and Bristol Street. Said nuisance being the stagnant water and insufficient drainage." Service of this order was made on May 20, 1874; and on September 7 following, the board of aldermen, acting as the board of health, passed the following order, which was approved by the

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mayor on September 10: "Ordered that the committee on health be and hereby is authorized and instructed to abate the nuisance existing on estates lying between Hampshire Street, Webster Avenue, Portland and Bristol Streets, by filling the same to grade, the respective owners thereof having been directed by order of this board of health dated May 12, 1874, to abate said nuisance, and failed so to do. The expense thereof to be charged to appropriation for incidental expenses and collected of the respective owners thereof in their several proportions according to law."

By the ordinances of the city of Cambridge, the mayor and aldermen are constituted the board of health. In pursuance of the above orders, the board of health, under the supervision of the civil engineer of the city, caused the premises of the several defendants to be filled by gravel to grade 13 above mean low-water, that is, grade 18 of city of Cambridge base, which is five feet below low-water mark. There was no evidence except as herein appears as to how, or when, or where, or under what law, the plaintiff city established any base of grade. The cost of such filling was as is alleged in the several declarations, and the same was paid from the treasury of the plaintiff city.

The nuisance consisted of stagnant and filthy water, standing from time to time on the premises of the several defendants, caused by cesspools, privies and other sources of filth, and surface water flowing from adjacent land of a higher grade, for which there was no practicable outlet from the defendants' premises into any public sewer, or elsewhere. Before 1874, the premises of the several defendants were sufficiently drained into West Dock, a creek immediately in the rear of their premises, into which the tide-water flowed from Charles River. In 1873, the mayor and aldermen, acting as a board of health, ordered and caused West Dock to be filled with gravel to grade 18, and thereby cut off any drainage of the defendants' premises into West Dock.

The defendants contended, and offered evidence to prove, that the condition of their premises, alleged to constitute a nuisance, was directly due to foul and noisome water and mud, which was caused by the backing up of the waters in the act of filling West Dock. But the judge did not find this to be the fact, although he did find that the filling of West Dock to a grade higher than the

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grade of the defendants' premises, before the filling of 1874, was the principal, if not the exclusive, cause of their condition when the acts of the board of health applied to them, by cutting off their previous means of drainage, and exposing them to the flow of surface water from West Dock as it was left when filled; and that neither the board of health nor the city of Cambridge had provided any means of draining the defendants' premises hitherto, nor was such drainage practicable into any previously established sewer of the city.

Upon these facts, the judge ruled that the plaintiff was entitled to recover the sums alleged in the several declarations, and ordered judgments accordingly. The defendants alleged exceptions.

The case was argued at the bar in January 1878, by *C. F. Donnelly*, for the defendants, and *J. W. Hammond*, for the plaintiff. In January 1879, a rescript was entered, sustaining the exceptions, and an opinion filed. The plaintiff thereupon applied to this court for leave to reargue the exceptions, and on this motion the court allowed written arguments to be filed by the same counsel.

AMES, J. Upon a reconsideration of these cases with the aid of the arguments submitted in writing on the motion for a rehearing, we see no reason to change the result already announced, or to alter the opinion in any respect, except by stating the grounds of decision somewhat more fully.

The St. of 1872, *c.* 299, was passed, as its title imports, "for the prevention and abatement of nuisances, and the preservation of the public health in the cities of Cambridge and Somerville." It was passed for the reason that a portion of the territory of each of these two cities was too low for convenient and proper occupation in its natural condition, and that, in order to secure the sanitary advantages of a complete drainage, it was necessary that these two cities should be entrusted with the power of raising such low lands to a proper level above mean low-water mark. This power is given, not to the boards of health, but to the boards of mayor and aldermen of these cities respectively.

By the fourth section of the statute, the board of mayor and aldermen was authorized to order the owners of lands, the surface of which was below thirteen feet above mean low-water mark, to raise the grade of such lands, "filling up the same with good ma-

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terials," "so as to abate and prevent nuisances, and to preserve the public health of the city." By the fifth section, in case the owner of such land fails to comply with such order within six months after it is served upon him, the board of mayor and aldermen of the city may raise the grade, and all necessary expenses incurred thereby shall constitute a lien upon the land so filled, and may be collected "as is provided by law for the collection of taxes upon real estate, and in case of land sold for taxes." The remaining sections provide remedies for any party who is dissatisfied with the assessment of the expenses, by petition to the county commissioners for a jury to revise the assessment, or by surrendering his land to the city.

It appears by the bill of exceptions that the premises owned or occupied by these defendants were situated in a part of the city of Cambridge where the natural surface of the soil was so low as to come within the description of land to which the statute above cited might well be considered applicable. It is expressly stated that the nuisance complained of consisted of stagnant and filthy water from cesspools, privies, &c., and surface water flowing from adjacent land of a higher grade, for which there was no practicable outlet from the defendants' premises. It is also found by the judge who tried the cases that the principal, if not the exclusive, cause of this state of things was the filling of West Dock by the city to a grade higher than the grade of the defendants' land, thereby cutting off their drainage and exposing them to the flow of surface water from West Dock.

Such being the condition of the defendants' premises, they presented a joint petition, not to the board of health, but to the board of aldermen, *eo nomine*, for relief from the nuisance, which they describe as having been occasioned by the filling up of the land and territory known as West Dock, caused by an order from the city of Cambridge under the grade law passed in 1872. Upon the facts of the case, they contended that the nuisance was occasioned, not by any act or neglect of their own, but that it resulted directly from the act of the city itself. The aldermen, instead of acting upon this petition, as such, saw fit to refer it to the board of health. It is true that both boards are made up of the same persons, yet the powers of the two boards

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are entirely distinct and separate. The result of this reference of the petition was, that the defendants were ordered to fill their lands up to grade at their own expense; and, upon their failure to do so, the aldermen, "as a board of health," caused the city engineer to perform the work. By the bill of exceptions, it appears that the grade to which the lands were raised by the engineer under this order was "grade 13 above mean low-water, that is, grade 18 of city of Cambridge base, which is five feet below low-water mark." It thus appears that the city of Cambridge had established a grade, which must have been under the St. of 1872. The proceedings recognize the existence of a preëxisting and established grade, which the board of health had no authority to establish, but which the board of mayor and aldermen on behalf of the city was authorized to establish by the terms of that statute.

Whatever aspect the case may take upon a new trial, we do not find upon the facts reported anything that satisfies us that the case as presented on this bill of exceptions was one which could be dealt with by a board of health, under the general powers conferred upon it by the Gen. Sts. *c.* 26. If the defendants had a right to claim the benefit of the St. of 1872, they could not be deprived of that right by the determination of the aldermen to act in the matter merely as a board of health. The improvements or operations which that statute has in view might, and ordinarily would, require the filling up of extensive tracts of land, and could rarely, if at all, be effectively carried out by the separate labor of independent landowners, each within the limits of his own land. The cases now before us apparently apply to a tract of land occupied by numerous owners, and bounded on each of its four sides by a street. It may be that no one of these proprietors could fill up his own land to the proper height without encroaching upon, and partially occupying, the land of his neighbors. The statute evidently contemplates the prevention or abatement of nuisances upon a general system, applicable to lots of land belonging to any number of proprietors. If the plaintiff is right in its view of the case, the aldermen, by acting as a board of health, might enclose a large and populous district with a wall or embankment of the height prescribed by the statute, and compel the landowners within the enclosure to

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complete the rest of the filling at their own expense, and thus deprive them of all the remedies intended to be given them by the statute. The law will not bear this interpretation.

The powers conferred upon boards of health by the Gen. Sts. *c.* 26, were intended to provide a summary and speedy remedy for the ordinary case of a local nuisance occasioned by the neglect or mismanagement of an individual upon his own land, which could be removed or abated by him personally. On the other hand, where the city, by establishing a new grade under the St. of 1872, has created a necessity for filling up lower lands to the prescribed new level, the proceedings must be such as are pointed out by the statute. It is true that the fourth section in terms provides that the mayor and aldermen may order the owner to raise the grade, but we do not understand this form of expression to give to them any right, if they give such order, to enforce it in any other manner than that statute prescribes, or to take away any of the rights or remedies intended to be secured by it to the landowner.

If these cases come within the terms of the St. of 1872, the only mode in which the city could throw upon the landowners the expense of the raising and filling would be that which is expressly pointed out by the statute itself. It gives no authority to the city to recover that expense by an action of contract against the landowner, and in that event the present actions could not be maintained.

If, however, it should be found that the case was one in which proceedings under the general power of the board of health could have been maintained under the Gen. Sts. *c.* 26, there still remains a question, upon which we do not now express any opinion, whether it was competent for the board of health to pass an order requiring a numerous body of landowners, taken collectively, to abate a nuisance upon the lands of all of them, produced by a cause affecting all of them; or whether the order should not have been addressed to the proprietors severally, and by name, requiring each to provide for his own land. However that may be, we find it necessary that there should be a new trial.

Exceptions sustained.

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GERSHOM M. FITCH *vs.* ROBERT L. TAFT.

Berkshire. Sept. 10, 1878. — May 12, 1879. AMES & SOULE, JJ., absent.

A landowner can maintain a complaint, under the Gen. Sts. *c.* 149, § 34, for the reassessment by a jury of his annual damages for the flowing of his land by the respondent's dam, although such damages were not "established by a jury" as provided in that section, but by an award of arbitrators, to whom the original complaint, by agreement of parties and under rule of court, was referred, and whose award was returned into court and accepted.

LORD, J. The complainant asks to have his annual damages for the flowing of his land by the respondent's dam reassessed by a jury, under the provisions of the Gen. Sts. *c.* 149, § 34. The respondent denies his right to a reassessment, upon the ground that the annual damages have been fixed by arbitration between the parties; and that the award of the arbitrators is final and conclusive, and cannot be reopened.

The complainant, on October 8, 1874, instituted an original complaint, under the Gen. Sts. *c.* 149, which was duly entered in court. The statute provides that in such a case the jury shall determine what amount of damages the complainant shall have sustained within three years next preceding the filing of his complaint. For such sum, the complainant is entitled to an execution. It is further provided that the jury shall also assess a sum in gross, which shall be full compensation for all damages to be sustained by maintaining the dam forever; and that the jury shall determine the amount of damages to be paid annually by the respondent for the right to maintain his dam. The complainant may within a limited time elect to take the gross sum thus assessed as full compensation for all injury to be thereafter sustained, or to take the annual damages as ascertained by the jury. By §§ 34, 36 of that chapter, if either party is dissatisfied with the annual compensation established by the jury, a new complaint may be instituted for the increase or diminution thereof, or for ascertaining the gross amount of the damages, with the limitations that the new complaint shall not be brought for the increase or diminution of the annual compensation "until the expiration of one month after the payment of the then last year has fallen due," nor for the assessment of gross damages,

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when the party has not elected to receive such gross damages, until the expiration of ten years thereafter.

When the former complaint was instituted, in 1874, the parties, instead of having these various sums assessed by a jury, agreed to refer the complaint under a rule of court to three arbitrators who were agreed upon, to whom were referred the same questions which, in the ordinary course of proceeding, would have been determined by a jury, namely, the past damages, the gross damages, and the annual damages. These arbitrators made their award, which was returned to and accepted by the court. The complainant did not elect to accept the gross damages, and the annual damages thus fixed by the arbitrators are those which the complainant is now dissatisfied with, and which he seeks to have reassessed by a jury.

The respondent contends, that this is wholly a statutory proceeding; that, to entitle a party to a reassessment of the annual damages, the previous annual damages must have been "established by a jury," and, inasmuch as no annual damages have been established by a jury, the complainant does not bring himself within the strict words of the statute; and that the effect of allowing a party to have his damages reassessed after they had been fixed by arbitrators would be rather legislation than administration of the law as it exists. This, however, we deem to be a too narrow and technical construction of the statute. It is true, the statute uses the phrase "established by a jury;" but we think the whole scope and purpose of the statute is more justly and equitably effected by giving to that phrase the broader and more appropriate interpretation as meaning "established by the proceedings under such complaint." The phrase "established by a jury," although entirely intelligible as applied to the subject-matter, is not in itself strictly and technically accurate. The language would be more accurate if it were "established through the intervention of a jury." The verdict of a jury, of itself, does not establish the damages. It must be accepted and recorded by the court before it is effectual; and, by § 30, "the court to which a verdict is returned may set it aside for any sufficient cause, and grant a new trial, to be had upon a new warrant or otherwise as the case may require."

The submission in this case having been made under a rule of

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court, and the award of the arbitrators having been reported as required by the rule to the court, the same action must be had by the court to make such finding of the referees valid and binding as would be had in case the findings had been by a jury. The only difference would be in what may be called the intermediate proceedings, in which the court could not revise the proceedings before the arbitrators in matter of law, as they could those before a jury; but the action of the court is as essential to the validity of the award of arbitrators as to the verdict of a jury. We cannot doubt that if the parties had submitted the determination of the three several questions to the presiding judge, without the intervention of a jury, and the complainant had not elected to take gross damages, the revision of the finding of the judge as to the annual damages would be open to the party, in the same manner as if it had been found by a jury and accepted and recorded by the court. We think, therefore, that it is the proceedings under the complaint, and the annual damages thus determined, which are the subject of revision. The statute clearly contemplates that the annual damages will vary from time to time, and what at one time would be an adequate compensation at a future time might be inadequate, or more than adequate. Its various provisions clearly contemplate this. By §§ 37, 38, provision is made for the owner of the mill or dam to tender a different sum from that found, and for the landowner to offer to accept a less sum than that found, and the sum thus found may be varied by the acceptance by either party of the tender of the other. We cannot believe that the purpose of the statute, in allowing such a change of compensation to be agreed upon between the parties, was to make that new compensation absolutely and forever binding upon them; but that it was the purpose to preserve the right to a reassessment, when either party should claim a change of circumstances; but the new compensation had never been fixed by a jury, and the same technical objection to a new complaint would exist in that case as in the present.

This view of the law does not conflict with the general principle that the finding of arbitrators is final and conclusive between the parties. A verdict of a jury and judgment thereon are final and conclusive. The provision that a new jury may be called

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to reassess the damages does not conflict with the proposition that the finding of a jury is conclusive. The finding of a jury and the award of arbitrators are equally conclusive upon the subject-matter committed to them. That subject-matter, in the present case, was the present annual damages. For the present annual damages, in whichever mode determined, the party has no right to judgment and execution, but it is a sum for which he may have an action, and for which he has a lien upon the mill.

Interpreting the statute in this mode, the proceedings under the former complaint established the rights of the parties by virtue of that complaint, and those rights are to allow either party, under the limitations and qualifications of the statute, to apply for a reassessment of the damages; and the result is

Jury to be ordered.

M. Wilcox, for the complainant.

J. Dewey, for the respondent.

Thomas Linnehan *vs.* Edward Sampson.

Essex. Nov. 8, 1878. — May 9, 1879. Endicott & Lord, JJ., absent.

In an action for personal injuries occasioned by the defendant's bull, while being led through a street of a city, the jury may infer that the defendant knew what is common knowledge in regard to the propensities of such an animal; and testimony that the defendant, after the accident, said that it was careless in his servant to lead the bull in the manner in which he was led, may be considered by the jury as an admission that the bull needed to be kept under control, and that the care taken in driving him through the street was insufficient.

If a person, while walking along a street in a city, hears a cry for help, and sees a man on the ground being gored by a bull, attached to him by a rope, and goes near the bull but does not attempt to assist the man, because he is afraid of the bull, and the bull attacks and injures him, the question, in an action for such injury, whether he was in the exercise of due care, is for the jury.

Tort. The declaration alleged that the defendant, on June 2, 1877, was the owner of a bull; that the bull was wild and vicious, and it was unsafe to drive or permit the bull to go through any public highway, without his being tied down or secured, so as to prevent injury to any person on the highway,

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all of which the defendant well knew; that the defendant wrongfully, carelessly and negligently drove the bull, so being wild and vicious, and not properly secured, in a certain highway; and that the bull ran with great violence against the plaintiff, he then being on the highway, and injured him. Answer: 1. A general denial. 2. Contributory negligence.

At the trial in the Superior Court before *Brigham*, C. J., the plaintiff introduced evidence tending to show that on June 10, 1877, he was walking in Lawrence, when his attention was directed to cries of help on a street at a right angle with the street he was on; that when he turned the corner he saw a man lying on his back in the middle of the road holding a rope attached to a ring in the nose of a bull, and the bull attempting to gore him; that the plaintiff went towards the bull and within a few feet of him, but did not attempt to assist the man whom the bull was trying to gore, because he was afraid of the bull, as he appeared to be dangerous; that the bull, by the detaching of the ring from his nose, escaped from the man holding him and rushed towards the plaintiff, who ran towards the gate of a yard on the side of the street, and while in the act of entering the gate was tossed by the bull into the air, fell senseless on the street, and, while lying there, was gored by the bull, and received the injuries complained of; that the defendant was, at the time, the owner of the bull, and his servant, by his direction, was then leading him through the street, when many persons were walking there.

The only evidence, on the part of the plaintiff, of the dangerous character of the bull, was that afforded by the conduct of the bull at the time of the injury, and its circumstances, and a declaration by the defendant to the plaintiff and his wife, that his servant was careless in leading the bull through the streets, and that he ought to have led him tied behind a wagon, as he had been led on a former occasion.

There was evidence, on the part of the defendant, that the bull was nearly three years old, and small of his age; and that, after he was one year old, he was kept for a year on a farm in New Hampshire, and afterwards, until the day of the plaintiff's injury, on a farm in Methuen, from which, on that day, the defendant's servant was removing him to the defendant's farm

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in North Andover; that the bull had never exhibited viciousness of disposition, but although when conducted from New Hampshire to Methuen he was tied behind a wagon, yet on the farm where he had been kept he had been managed by a snap-ring fastened in his nostrils by a spring, and attached to a rope, and was tractable when thus managed; and that the defendant had no knowledge of any exhibition of viciousness or dangerousness of the bull before the plaintiff's injury; that, while the servant was leading the bull by the rope, the white dress and red scarf of a girl excited the bull, the servant struck him, and thereupon the bull threw the servant down and was attempting to gore and trample on him, when some person struck the bull, and he rushed forward and leaped over the servant, detaching the snap-ring from his nose as he did so, and pursued and injured the plaintiff; that the man who had the care of the bull at the defendant's farm had found the bull to be gentle, and had never seen anything dangerous or vicious about him, and that with a snap-ring he could lead him like a dog. A snap-ring such as was used in leading the bull on the occasion of the plaintiff's injury, and also a ring of different style, such as is used in managing bulls, and was claimed by the plaintiff to be more adapted to safety, were exhibited to the jury at the trial.

The defendant requested the judge to instruct the jury as follows: "1. That, as plaintiff alleges in his declaration that, before and at the time of the injury, the defendant's bull was wild and vicious, and was unsafe to be led through the public streets, and the defendant knew the same, the plaintiff, in order to maintain this action, must prove that the bull was wild and vicious before and at the time of the alleged injury, and was unsafe to be led through the streets unless confined, and that the defendant had such previous knowledge of the wild and vicious habits and inclinations of said bull. 2. That the defendant is not liable for the injuries wilfully committed by his bull, unless the plaintiff proves that the defendant had actual notice of the habits and inclinations of the bull to commit the injury complained of, and that, having such notice, he did not use reasonable care in taking care of said bull. 3. That if the plaintiff, when he saw the servant on the ground, and the bull goring him, and knew the bull was dangerous, and, knowing the dangerous character of said bull, made an

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attack on the bull, or went so near him that the bull could attack him, he was guilty of contributory negligence. 4. That if the plaintiff knew, or had reasonable cause to believe, that it was dangerous to go to the assistance of the servant, when the bull had him down and was goring him, and did so, it was contributory negligence, and the calls of humanity would be no excuse. 5. That if the bull was only two years and eleven months old, and had no wild and dangerous habits or tendencies known to the defendant or his keeper, and the defendant was informed that he was gentle, and could be led like a dog, then it was not negligence on the part of defendant or his servant to attempt to lead him through the public streets with a snap-ring used by his keeper to lead him. 6. That if the snap-ring used in leading said bull was such as one made and used for the purpose of leading such animals, then the defendant's servant, in using the same to lead such bull, was in the exercise of due care."

The judge refused to give these instructions, but instructed the jury as follows: "The plaintiff, in order to recover, must prove that the bull which caused his injury was the defendant's property, and had such propensities, known to the defendant, as caused him to be a dangerous animal when led by one person only upon the streets of such a city as Lawrence, in the daytime, by means of a rope attached to a snap-ring fastened to the bull's nose, and, being thus dangerous, was led by the defendant's servant, acting within the scope of his general employment, or by the defendant's specific direction; that the conduct of the defendant's servant in thus leading the bull was negligent in view of the propensities of the bull known to the defendant, or of the known, ordinary and usual disposition and propensities of such animals; and that the plaintiff's conduct, on the occasion of his injury, was not wanting in reasonable prudence and caution, in view of all the circumstances of his injury. In the absence of any specific evidence of any exhibitions of viciousness or unruliness by the defendant's bull, which had been seen by or brought to the knowledge of defendant, he would not be responsible for injuries to any person caused by such propensities, unless such propensities were usual and ordinary in bulls like the defendant's bull; in which case, the defendant might reasonably be supposed, as owner of the bull, to have known such ordinary and usual

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propensities, and it would have been negligence in him not to have adapted his use and treatment of him to such ordinary and usual propensities."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. C. Sanborn, for the defendant.

D. Saunders & C. G. Saunders, for the plaintiff, were not called upon.

AMES, J. The instructions to the jury were sufficiently favorable to the defendant, and were all that the case required. It was ruled that, in order to recover in this action, the plaintiff must prove that the bull had such propensities, known to the defendant, as caused him to be a dangerous animal when led by one person only, in the day-time, upon the streets of a city, in the manner described in the evidence reported in the bill of exceptions; and also that it must be proved that, in thus leading the bull, the defendant's servant was negligent, in view of the propensities of the bull known to the defendant, or of the known, ordinary and usual disposition and propensities of such animals. It might well be that, previously to the injury, the defendant had had no trouble in managing the animal, and no knowledge of anything specially or peculiarly vicious in his habits or inclinations. But the jury may have believed that he knew, what is a matter of common knowledge, that a bull is an excitable and powerful animal, and that, if from any accidental or unexpected cause he should become excited while led or driven through a public street, he might be dangerous. *Hudson* v. *Roberts*, 6 Exch. 697. It is impossible to say, upon the evidence reported, that the jury would not be justified in finding that the knowledge, which by the ruling of the court was necessary to the maintenance of the action, was satisfactorily proved. There was testimony to the effect that the defendant had said that it was careless so to lead the bull through the streets, and that he ought to have been tied behind a wagon, as he had been once before. The jury, if they believed this evidence, might well have considered it as an admission that he knew that the animal needed to be kept under control, and also that he knew that the control which his servant had applied for the purpose of leading him through the streets was insufficient. In *Lyons* v. *Merrick*, 105 Mass. 71, it was

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held that the owner or keeper of animals of a vicious disposition or mischievous habits, of which the owner had previous actual or implied notice, is bound at his peril to keep them at all times and in all places properly secured, and is responsible to any one who, without fault on his own part, is injured by them. The case of *Hewes* v. *McNamara*, 106 Mass. 281, is to the same effect. If the jury were satisfied that the defendant knew, or ought to have known, that the bull had dangerous propensities, it is unnecessary to prove that on any previous occasion he had actually endangered the life or limb of any person. *Worth* v. *Gilling*, L. R. 2 C. P. 1. There is certainly some evidence of a *scienter* in this case, and the question of its weight is not before us. *Applebee* v. *Percy*, L. R. 9 C. P. 647.

A question was raised at the trial as to contributory negligence on the part of the plaintiff; and it was contended that he was not in the exercise of reasonable care in approaching so near to the bull as he did; and that the calls of humanity would be no excuse. But the question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all the circumstances, was submitted to the jury, as a question peculiarly for them to decide. They were to consider all the circumstances, and, among other things, that the life of a fellow-creature was in extreme danger; but they must have understood that reasonable prudence and caution were elements in the case which the plaintiff must prove. It does not follow, as a matter of law, that in encountering the danger he was necessarily guilty of a want of due and reasonable care. The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment. *Buel* v. *New York Central Railroad*, 31 N. Y. 314. In *Eckert* v. *Long Island Railroad*, 43 N. Y. 502, a case of the rescue of a child from being run over by an approaching train, the court say that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." The law does not require cowardice or absolute inaction in such a state of things. Neither does it require in such an emergency that the plaintiff should have acted with entire self-possession, or that he should

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have taken the wisest and most prudent course, with a view to his own self-preservation, that could have been taken. He certainly may take some risk upon himself, short of mere rashness and recklessness. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137. The evidence reported does not conclusively show a want of due care and prudence on his part, and it was therefore properly left to the jury. *Lane* v. *Atlantic Works*, 107 Mass. 104. What is ordinary care is usually to be settled by the judgment and experience of the jury, and not of the judge. *Gaynor* v. *Old Colony Railroad*, 100 Mass. 208. *Exceptions overruled.*

MICHAEL H. BUTLER *vs.* SUFFOLK GLASS COMPANY.

Suffolk. Nov. 26, 1878. — May 8, 1879. COLT & MORTON, JJ., absent.

A. and B. entered into an agreement, by the terms of which B. was to put up certain works on the land of A., and guaranteed that they would be capable of producing certain results, and A. was to pay a certain price therefor. A. subsequently brought an action against B. on the agreement, alleging the non-performance of the agreement, and the abandonment of the work by B. in an incomplete state; that A. had advanced certain sums of money to B. during the progress of the work; and claiming to recover these sums and other damages. B. filed an answer containing a general denial; and also brought an action against A. on the agreement, alleging full performance on his part, and claiming to recover the price agreed upon for the work. The two cases were tried together, and the jury returned a verdict for A. for the sums advanced to B., and, in the other case, a verdict for the full amount claimed by him. This last verdict was set aside. *Held*, on a new trial of the action of B. against A., that the judgment in favor of A. in the other case estopped B. to prove performance of the contract on his part; and that evidence was inadmissible to show that the issue of performance was not submitted to the jury in that case.

CONTRACT. Writ dated September 10, 1874. The declaration alleged that the plaintiff and the defendant executed an agreement in writing, a copy of which was annexed, dated August 26, 1873, by the terms of which the plaintiff, in consideration of $9000 to be paid to him by the defendant, agreed to build and put in operation upon the defendant's land certain works for the manufacture of gas from crude petroleum, the plaintiff guaranteeing that the works, when completed, would be capable of

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producing a certain number of feet of gas each day, of a heating power equal to that produced by coal, and at a less expense; that the plaintiff had performed his part of the contract, but the defendant refused to perform his part; and that the defendant owed the plaintiff the sum of $9000. Answer, a general denial, and an allegation that during the progress of the work the defendant had paid the plaintiff the sum of $1000, on account of such work and materials; that no part of the work and materials was of any value to the defendant, but was of great damage, for which damage the defendant, before this action was begun, had brought an action against the plaintiff, which was still pending. The case was referred to an auditor, who found that the plaintiff could not maintain his action.

The defendant subsequently filed an answer *puis darrein continuance*, alleging that on December 28, 1876, the defendant recovered judgment against the plaintiff, in an action brought upon the same written agreement upon which this action is brought, in which the same issue was tried as is to be tried in this action.

At the trial in the Superior Court, before *Colburn*, J., the defendant relied upon the facts set forth in the supplemental answer; and put in evidence the record in the action of Suffolk Glass Company against Butler, and asked the judge to rule that the judgment therein was a bar to this action.

It appeared by this record that on March 25, 1874, the Suffolk Glass Company sued out a writ against Butler, returnable to the July term of the Superior Court. The declaration, which was in contract, set forth the written agreement declared on in the case at bar, alleged that Butler entered upon the performance of his work under the agreement, and furnished part of the materials and did a part of the work called for; that, instead of completing the work, he left and abandoned it in an imperfect and incomplete state, and refused to complete the same within the time specified; that part of the work done was improperly done; that the plaintiff had suffered great loss in filling and grading its land, had been delayed in its business and had been put to great expense; that its agents and servants had spent much time in the matter; and that the plaintiff had paid to Butler about $700 on account of the material and work done. The defendant filed

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an answer denying each and every allegation in the plaintiff's writ and declaration contained.

It further appeared from the record that the case was sent to an auditor, who found that the apparatus mentioned in the agreement had been completed by Butler, but that it failed to work satisfactorily, and did not furnish the heat called for, and was abandoned after several trials; and that Butler had not fulfilled the requirements of the agreement; that the plaintiff paid to Butler, during the work, the sum of $620.67; that a large part, if not all, of the time spent by the plaintiff's agents during the work, and of the inconvenience sustained, would have been the same had the apparatus succeeded; and found for the plaintiff in the sum of $620.67.

The record further showed that, at October term 1876, the jury returned a verdict for the plaintiff, and assessed damages in the sum of $715.52.

The plaintiff in the case at bar then offered to prove the following facts: The two actions were tried together at October term 1876, before *Aldrich*, J. The action of the Suffolk Glass Company against Butler being first in order, the plaintiff in that case put in the auditor's report, and rested its case, the counsel stating that nothing was claimed in that case except what the auditor found. The judge instructed the jury that, if they found for the plaintiff, they could not give it more than the auditor had found, namely, the money paid out; that, although the plaintiff had set forth other grounds of action, no evidence had been offered as to them; that, if they found for the plaintiff for the money paid out, they should take no account of this in the other action, because the plaintiff might use it as a set-off, in case the jury should find for the plaintiff in that action. The jury thereupon returned a verdict for the Suffolk Glass Company, in the first case, as before stated, and in the case at bar returned a verdict for Butler in the sum of $10,128. On motion of the defendant, the judge set aside the last-named verdict. The counsel thereupon signed and filed an agreement that execution should not issue in the first-named case until judgment was entered in the case at bar.

The defendant contended that the plaintiff was estopped by the judgment in the first case to set up performance of his con-

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tract in this action. The plaintiff contended that he had the right to show by the above evidence, that the issue of performance or non-performance of his contract was not submitted to the jury in the first case, and that the only issue submitted to them was whether the company had paid the money to Butler at his request.

With the consent of the parties, before verdict, the judge reported the case for the determination of this court. If the evidence offered was admissible, the case was to stand for trial; if the judgment in the case against Butler was, as matter of law, a bar to the present action, judgment was to be entered for the defendant.

E. Avery & H. G. Pickering, for the plaintiff.

T. H. Sweetser & G. A. A. Pevey, (*W. Gaston* with them,) for the defendant.

SOULE, J. The action against the plaintiff, in which this defendant recovered substantial damages, was founded on an alleged failure of the plaintiff in the case at bar to perform the contract on which he now sues. The answer was a general denial, and put in issue the performance, as well as the amount of injury sustained by failure to perform. The declaration set forth a partial payment, while the work was in progress, as one of the elements of damage. No recovery could have been had except on proof of failure to perform. The judgment was for the damage sustained by the defendant in consequence of the non-performance. We must presume that the action was properly tried, and that the damages were assessed on correct principles. The judgment, therefore, established the fact that, apart from all advantage and benefit received by this defendant from what was done in the way of performance of the contract, it had been injured in the transaction to the extent of the damages for which the judgment was rendered in its favor. The mistake of the plaintiff is in supposing that, because damages were recovered against him in the former action for the non-performance of his contract, he is now in substantially the same situation as if he had performed it; whereas the damages recovered must have been computed in view of the fact that this defendant was released, by the failure of the plaintiff to perform, from the further performance of its undertakings in the contract. The whole

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subject-matter of the rights of the parties growing out of the contract sued on was necessarily considered and adjudicated in the former action, if, as we must assume, the true rule of damages was there adopted. The judgment in that action is therefore conclusive against the plaintiff. *Gates* v. *Ryan*, 115 Mass. 596. The evidence offered of what took place at the trial of that action was not admissible to control the effect of the judgment. If there was any error in that trial, it could be corrected only in that action by motion for new trial, exceptions, or petition for review. It cannot be shown in this.

Judgment for the defendant.

NOAH MAYO *vs.* BENJAMIN D. PETERSON.

Suffolk. March 6. — May 9, 1879. MORTON & ENDICOTT, JJ., absent.

In an action for money had and received, the plaintiff testified, against the defendant's objection, that he went to the defendant with a promissory note signed by A., and asked the defendant to get it discounted for the plaintiff's use; that the defendant produced another note for a larger amount signed by B., and said he would lend it to the plaintiff, and retain the note of A., and take the plaintiff's note for the difference in amount between the note of A. and the note of B., and hold these notes as collateral security for the loan of the note of B; that the plaintiff assented to this proposal, and gave his note to the defendant; that the plaintiff had the note of B. discounted; that, a few days before the note of A. and the plaintiff's note became due, he learned that these notes were held by a bank; that the defendant then told him that he had used the notes, and that when the note of B., who had failed before this conversation occurred, became due, the defendant would take care of it; that the plaintiff paid all of the notes at their maturity, and offered the note of B. to the defendant, and demanded of him the money paid on the other notes. *Held*, that the defendant had no ground of exception to the admission of the plaintiff's evidence; and that, on the return of the note of B. to the defendant, the plaintiff was entitled to maintain the action.

CONTRACT for money had and received. Answer, a general denial.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff testified that, in June 1877, he went to the defendant with a promissory note for $488.21, dated May 17, 1877, signed by S. Rich & Co., payable to the order of the plaintiff in three

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months, and by him indorsed, and asked the defendant to get the note discounted at the defendant's bank, and allow the plaintiff to take the proceeds for his own use; that the defendant thereupon produced a promissory note for $582.50, dated May 29, 1877, signed by James Power & Co., payable in four months to the order of John Dole, and by him indorsed, and said that he should not want to use the note, and would lend it to the plaintiff, if that would answer the latter's purpose; that the plaintiff said it would, and offered to give a receipt for it; that the defendant suggested that, instead of a receipt, he should retain the note of S. Rich & Co., and take the plaintiff's note for the difference in amount between the former note and the note of James Power & Co., and hold both notes as collateral security for the loan of the Power note; and that the plaintiff assented to this proposal, and thereupon gave to the defendant a note for $94.29, dated May 17, 1877, payable to the order of the defendant in three months. The defendant contended that the transaction between the parties was an exchange of notes, and objected to any evidence as to the conversation between the parties at the time the notes were given, on the ground that the admission of such evi dence was an attempt to contradict by parol the terms of written instruments; and also objected to any evidence in regard to these notes, except to show a want of consideration, for which he claimed the Power note was sufficient; but the judge overruled the objection, and admitted the evidence.

The plaintiff further testified, against the defendant's objection, that he had the note of James Power & Co. discounted; that, a few days before the notes of S. Rich & Co. and his own note became due, he learned that these notes were held by a bank in Boston; that he then saw the defendant, and the latter told him that he had been short of money, and had used the notes, and that when the note of James Power & Co., who had failed before this conversation occurred, became due, the defendant would take care of it. The plaintiff paid all of the notes at their maturity, and offered the note of James Power & Co. to the defendant, and demanded of him the money paid on the other notes.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

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L. M. Child, for the defendant.

H. J. Boardman & C. Blodgett, for the plaintiff.

AMES, J. It is a mistaken assumption on the part of the defendant that the contract between these parties was contained in or expressed by the three notes described in the bill of exceptions. In the evidence offered by the plaintiff, he made no attempt to show that either of these notes was subject to any unwritten condition, or was to be interpreted otherwise than according to the literal import of the words in which it was expressed. What he undertook to prove was, that, instead of indorsing a note for the plaintiff as he had requested, the defendant proposed to lend to the plaintiff the note of Power & Co., which the plaintiff was to get discounted without the defendant's indorsement; in other words, that, instead of lending the money or his own indorsement, he placed in the plaintiff's hands a negotiable security upon which he himself might and did obtain the money that he was then in want of. He also undertook to prove that, as collateral security for this loan, he placed in the defendant's hands the other two notes described in the bill of exceptions. This evidence was competent and admissible, and if it were believed by the jury, it would follow that, on returning the Power note to the defendant, the plaintiff would be entitled to take back and have returned to him the collateral security which he had previously deposited. Unless the plaintiff had himself done some act which would have the effect to release either the promisors or the indorsers upon the Power note, the only loss which the defendant could suffer would arise from the insolvency of those promisors and indorsers, — a loss fo which the plaintiff could not be responsible. With regard to the plaintiff's own note, he might by this evidence show a failure of consideration. If the two other notes were deposited with the defendant simply as collateral security for the loan, as described by the plaintiff, the appropriation of this security by the defendant to his own use was a wrongful act on his part, and he might justly be held accountable in this action as for money had and received which equitably belonged to the plaintiff. *Exceptions overruled.*

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MARY W. DRURY *vs.* WILLIAM H. HERVEY.

Suffolk. March 10. — May 9, 1879. MORTON & ENDICOTT, JJ., absent.

If a chattel, sold on condition that, until paid for, no title shall vest in the purchaser, and that, if not paid for as agreed, the seller shall have the right to enter upon the premises of the purchaser and take the chattel away, is taken to a room hired by the purchaser in the house of a third person, who has no knowledge of his title, the seller, on breach of the condition in regard to payment, has a right to enter such house in a reasonable manner to get the chattel; but if the purchaser of the chattel is absent, and the wife of the owner of the house, in the absence of her husband, requests the seller to wait two hours until the purchaser returns, it is not reasonable for the seller to push the wife aside and enter, and, if he does so, an action may be maintained against him for an assault, although he shows the agreement to her, and tells her for what he has come.

If a servant of A. goes to a house to get possession of a chattel, which A. has the right to take in a peaceable manner, evidence that the owner of the house, immediately after the entrance of the servant, said to a third person, in the hearing of the servant, but not in his presence, that the servant had entered against his will and had pushed him aside, and that the servant, who was on his way up-stairs to get the chattel, said nothing in reply, is incompetent, as an admission of the truth of the charge, in an action against A. for such assault.

TORT for an assault. Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

In April 1877, the plaintiff, who lived with her husband in his house in Boston, let two rooms therein, with his consent, to Heman P. Newton, who furnished and occupied the rooms. In July of the same year, Newton procured a lounge from the defendant, a furniture dealer, and signed and delivered to him an agreement in writing, which provided that the lounge was to be paid for by weekly instalments; that, until paid for, no title to the lounge should vest in Newton; and that the defendant should at all times have access to it, and the place wherein it might be; and, in case default should be made in the payment of any instalment, the defendant might enter upon the premises of Newton, and take possession of the lounge, without being liable for a trespass.

The lounge was taken to the rooms of Newton, and used there by him, without knowledge on the part of the plaintiff and her husband of his title thereto. Newton did not pay for the lounge as agreed, and after repeated demands upon him for payment,

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and his refusal to pay, the servants of the defendant went to the plaintiff's house in the afternoon of November 22, 1877, to get the lounge.

The plaintiff's evidence tended to show that, when the servants went to the house, the plaintiff, her husband being absent, answered the bell, and opened the front door about a foot; that the servants told her who they were, and the object for which they had come, showed her the agreement with Newton, and then asked permission to enter to get the lounge; that she refused to allow them to do so; and asked them to wait two hours, until Newton, who was then absent, should return; that the servants stepped up into the door, which was still open about a foot, and pushed the door open still further, and as far as they could go in; and that this was done against the will and resistance of the plaintiff. It did not appear that the servants used any more force than was necessary in thus opening the door.

It further appeared that, after the servants got into the hall, the plaintiff opened a door leading from the hall into an adjoining room, and, standing in or near the door, spoke to two visitors who were then sitting in the room and were strangers to the servants; and these persons were allowed to testify, against the objection of the defendant, that the plaintiff stated to them that the servants had shoved her away from the door, and pushed into the house against her will. There was no evidence that, at the time the plaintiff spoke to these persons, the servants were in sight of them, or had seen them, or knew that they were in the house. But these witnesses were allowed, against the defendant's objection, to testify further that they believed that the servants were in the hall and within hearing, because they heard one of them speak immediately after, and saw them go up-stairs for the lounge, and had previously seen them when they came up to the house. It appeared that the servants made no reply to the above statements of the plaintiff; and the servants testified that they did not hear these statements. The judge instructed the jury that they might consider such statements, made by the plaintiff to the visitors, as evidence of an admission of such shoving and pushing of the plaintiff, if the jury were satisfied that the servants heard the statements and did not deny them.

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The defendant asked the judge to instruct the jury as follows: '1. Under the agreement between Newton and the defendant, the latter and his servants had a right, in a reasonable and proper manner, to enter any premises occupied by Newton to examine or to remove the lounge, if Newton did not pay for it as stipulated. 2. If Newton was a tenant of a part of a house, he and those with whom he did business had the right to pass in and out for all reasonable purposes, and if the defendant had permission or license from Newton to enter his premises to examine or take the lounge, the defendant and his servants had the right, in a peaceable and proper manner, to go to Newton's rooms to get the lounge; and the plaintiff had no right to interfere to prevent them, especially after they had made known their errand to her. 3. If the plaintiff did interfere to prevent them, and was injured in consequence of such interference, she cannot recover if the defendant's servants used no more force than was reasonably necessary to remove the lounge."

The judge refused so to rule; but instructed the jury that the plaintiff, in the absence of her husband, had the same rights to the possession of the premises that he had; that she had a right to close the door, the right to open it wide, or only a foot, or partly, as she saw fit, and to forbid the defendant's servants to enter, and to keep them out by force; and that the agreement with Newton might be considered as evidence that the servants went to the house for a lawful and peaceful purpose, but not as evidence of any right, license or permission to enter the house to get the lounge against the will of the plaintiff.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. B. Richardson, for the defendant.

M. A. Blaisdell, for the plaintiff.

AMES, J. If the defendant had a right to take the lounge into his possession, his servants would be justified in entering the dwelling-house in order to exercise that right, provided the entry were made in a reasonable manner, and without a resort to force and personal violence. *McNeal* v. *Emerson*, 15 Gray, 384. As a general rule, such a right is not to be enforced at the expense of a breach of the peace. *Sampson* v. *Henry*, 11 Pick. 379. *Churchill* v. *Hulbert*, 110 Mass. 42. It was properly ruled at the

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trial, that, in the absence of her husband, the plaintiff had the same right to the possession that he had. But the defendant contends that, under the terms of his agreement with Newton, he had not merely a right to enter the building in order to take away the lounge, but also to effect his entrance by force, provided he used no more force than was reasonably necessary for that purpose.

We think, however, that the rulings requested by the defendant, as to the right of the plaintiff to resist the entrance into her dwelling-house, were properly refused. The judge was not bound to adopt the language used in those requests, and the instructions which he gave were more appropriate to the case as it stood upon the evidence, and were all that the defendant was entitled to ask. His servants, on appearing at the door, informed the plaintiff of the purpose of their coming; but it does not appear that she had any means of knowing that Newton's debt remained unpaid, or that she had any reason to know or believe, other than their unsupported word, that the strangers who were seeking admission had any right whatever to go to Newton's room to take away furniture in his absence. She might well ask them to wait for a short time until she could see Newton on the subject. It does not appear that this request was unreasonable, or that the defendant could have lost any right or sustained any inconvenience beyond a brief delay, by yielding to it. Under such circumstances she had a right to resist their entrance.

But, upon a question as to the admissibility of certain evidence offered by the plaintiff, we find more difficulty. It appeared that, after the defendant's servants had effected their entrance, the plaintiff said to certain visitors in an adjoining room that they had pushed her away from the door, and forced their way into the house against her will. The court ruled that, if they heard what she said, and did not deny it, the jury might consider their silence as evidence of an admission that they had committed the acts of violence which the plaintiff imputed to them. This ruling was erroneous, as the evidence does not indicate that they were bound to make any answer. Silence under an imputation can never be considered as an admission of the truth of the charge, unless the circumstances are such that a denial would naturally be expected, or an explanation of some sort would naturally be

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called for. *Boston & Worcester Railroad* v. *Dana*, 1 Gray, 88. *Commonwealth* v. *Harvey*, 1 Gray, 487. *Commonwealth* v. *Kenney*, 12 Met. 235. *Commonwealth* v. *McDermott*, 123 Mass. 440. *Commonwealth* v. *Walker*, 18 Allen, 570. What the plaintiff said was not addressed to them, and cannot be said to have called for a reply. In estimating the proper inference to be drawn from silence, full allowance must be made for the attending circumstances. The defendant's servants were on their way to Newton's apartment to perform the manual labor of carrying away an article of furniture, and it was hardly to be expected, or certainly it was not a matter of course, that, after they had effected an entrance into the house, they should stop on their way to have a conversation, and perhaps an altercation, with the plaintiff, as to the manner of such entrance.

In consequence of this error, a new trial has become necessary.

Exceptions sustained.

JOHN GOLDEN, Jr. *vs.* HENRY M. BLASKOPF.

Suffolk. March 14. — May 9, 1879. MORTON & ENDICOTT, JJ., absent.

If the parties to an action file in court an agreement that judgment may be entered on a certain day, and on that day the defendant files a suggestion of his bankruptcy, which is not brought to the attention of the court until after judgment has been entered, it is within the discretion of the court, under the Gen. Sts. c. 146, § 21, to grant a writ of review to the defendant to enable him to set up a composition in bankruptcy as a defence.

WRIT OF REVIEW to reverse a judgment recovered by the defendant in review against the plaintiff in review. Trial in the Superior Court, without a jury, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The original action was begun by an attachment of the defendant's property on March 18, 1876. The defendant gave a bond to dissolve the attachment, and the writ was returned and entered. After the defendant had filed his answer, denying generally his liability, and at the time when the case was about to be reached for trial, the attorneys for the parties made an agree-

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ment that judgment should be entered for the plaintiff, for the amount claimed, on July 5, 1876. This agreement was filed in court on June 10, 1876, and minuted on the docket. On July 3, 1876, the defendant filed a voluntary petition in bankruptcy in the District Court of the United States, and on July 5, 1876, about ten o'clock in the forenoon, filed a suggestion of bankruptcy in the Superior Court. On July 7, 1876, execution issued.

On August 8, 1876, the defendant petitioned for a writ of review, which was granted, and this writ of review issued. The defendant in review pleaded in abatement the agreement for judgment and a judgment accordingly; the plaintiff in review filed a replication, setting up his composition with his creditors in bankruptcy; and it was agreed that this, if now open to the plaintiff in review, was a valid defence to the original action.

The defendant in review asked the judge to rule that the agreement for judgment on July 5, 1876, was a waiver of the right of review; that, even if the suggestion of bankruptcy was filed in court, it could not avail the plaintiff in review, unless he brought a motion for continuance to the notice of the court before the end of the term at which judgment was entered; and that the plaintiff in review is not entitled to a review as matter of law.

The judge refused so to rule; but ruled that all matters of equitable consideration or of discretion had been open upon the petition for a review, and that in this trial on the writ of review the parties stood upon their strict legal rights; that, the suggestion of bankruptcy having been filed prior to the rendering of the original judgment, although not called to the attention of the court, the plea of discharge by the resolution of composition, as set up, must prevail; found for the plaintiff in review, and ordered judgment accordingly. The defendant in review alleged exceptions.

C. K. Fay, for the defendant in review, cited *Hall* v. *Wolcott*, 10 Mass. 218; *Dunbar* v. *Baker*, 104 Mass. 211; *Cutter* v. *Evans*, 115 Mass. 27; *Boston* v. *Robbins*, 116 Mass. 313; *Todd* v. *Barton*, 117 Mass. 291; *Edwards* v. *Reginam*, 9 Exch. 628; *Wright* v. *Mills*, 4 H. & N. 488.

G. M. Hobbs, (*E. Avery* with him,) for the plaintiff in review.

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GRAY, C. J. The objections taken would have been more properly presented at the hearing of the petition for a review, but, assuming them to be now open, they cannot avail.

The judge before whom the case was tried without a jury has found as matter of fact that the suggestion of bankruptcy was filed before the rendering of the original judgment. If that suggestion had been brought to the notice of the court before the actual entry of judgment, the case must have been continued to await the result of the proceedings in bankruptcy, and the suggestion could not have been defeated by an entry of judgment *nunc pro tunc*. U. S. Rev. Sts. § 5106. *Ray* v. *Wight*, 119 Mass. 426. *Clinton National Bank* v. *Taylor*, 120 Mass. 124. *Page* v. *Cole*, 123 Mass. 93. The suggestion of bankruptcy not having been brought to the notice of the court until after judgment had been entered, a review might properly be granted for the purpose of enabling the proceedings in bankruptcy to be set up by way of defence. Gen. Sts. *c.* 146, § 21. *Todd* v. *Barton*, 117 Mass. 291. *Shurtleff* v. *Thompson*, 63 Maine, 118.

It is contended, upon the authority of *Edwards* v. *Reginam*, 9 Exch. 628, and *Wright* v. *Mills*, 4 H. & N. 488, that the judgment took effect as of the earliest minute of the day on which it was rendered, and therefore in law took precedence of the suggestion of bankruptcy filed at ten o'clock on the same day. It is not clear that it would be allowed such an effect in England in an action between individuals. *Green* v. *Laurie*, 1 Exch. 335. Robson on Bankruptcy (3d ed.) 504. In this country, fractions of a day are usually regarded, when necessary for the ends of justice. *Bigelow* v. *Willson*, 1 Pick. 485, 495. *Brainard* v. *Bushnell*, 11 Conn. 16. *Lemon* v. *Staats*, 1 Cowen, 592. And if the judgment could by a technical rule have the unjust operation contended for, it was certainly within the discretion of the court to grant a writ of review in order to prevent that consequence.

The previous agreement of the parties for the entry of judgment, although it might, according to the decision in *Hall* v. *Wolcott*, 10 Mass. 218, have been a waiver of a review as of right, could not control the discretion of the court in granting a review upon petition. *Exceptions overruled.*

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COMMONWEALTH, by Board of Commissioners of Savings Banks, *vs.* BARNSTABLE SAVINGS BANK. Charles Endicott, Treasurer of the Commonwealth, petitioner.

Suffolk. March 24. — May 10, 1879. AMES & LORD, JJ., absent.

A savings bank is liable to the tax imposed by the Sts. of 1862, c. 224, and 1868, c. 315, one half on the average amount of deposits for the six months preceding the first day of May, and the other half on the average amount for the six months preceding the first day of November, although it is on one of those days, and has been, for more than six months preceding, temporarily prohibited by a writ of injunction, issued on the petition of the commissioners, from proceeding with its business, except in receiving and collecting money due to it, in making investments in specified securities, and in foreclosing mortgages and selling land held by foreclosure; and although it is after May 1 perpetually restrained from doing business, and receivers are appointed.

PETITION IN EQUITY, filed February 21, 1879, alleging that on May 1, 1878, the sum of $4842.38 was duly assessed upon the defendant corporation, being a tax of three eighths of one per cent on the average amount of deposits therein for six months preceding said May 1; that on May 23, 1878, said corporation was, by a decree of this court, perpetually restrained from the exercise of its franchise, and receivers were appointed to wind up the affairs of the corporation; that demand had been made upon the corporation and upon the receivers for the payment of the tax, but payment had been refused. The prayer of the petition was that the receivers be ordered to pay said tax with interest, and for further relief. The answer of the receivers admitted that the tax was assessed; but alleged that, at the time for which the tax was assessed, the defendant corporation was restrained from doing business by an injunction issued from this court.

The case was heard by *Ames*, J., and reserved for the consideration of the full court, upon the petition and answer and the following agreed facts:

On September 28, 1877, the board of commissioners of savings banks filed in this court a petition against the defendant corporation, setting forth that, upon an examination of the condition of the corporation, they were of opinion that its condition was such as to render its further proceeding hazardous to the public and

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to those having funds in its custody; and praying that a writ of injunction might issue, commanding the corporation and its officers and agents to refrain from further proceeding with the business of the corporation, except so far as might be necessary to maintain and continue the organization of the corporation, until a hearing could be had upon this petition; and that, after such hearing, the court would appoint one or more trustees or receivers to take possession and control of the property and effects of the corporation, subject to the order of the court; and for an order to show cause why such injunction should not be made perpetual, and receivers appointed.

On the same day, a writ of injunction issued restraining the corporation and its officers and agents from further proceeding with the business of the corporation, except so far as might be necessary to maintain and continue its organization, and to collect and receive moneys due it, and on payment thereof give receipts therefor, and release, assign, discharge, or otherwise convey to the debtor any property or estates held by the corporation as security therefor, until a full hearing could be had, and until the further order of the court; and ordering notice to the corporation in accordance with the prayer of the petition.

On October 16, 1877, the injunction was modified by giving the corporation authority to do the following acts in addition to those first authorized: "1. To bring suits, and to do all other things necessary to collect moneys or property due to said bank. 2. To invest any money which it may have on hand in the securities specified in the St. of 1876, *c.* 203, § 9, *cl.* 2, 5; provided, however, that no loan is to be made under the fifth clause to any person not a depositor in the bank; and provided further, that, in addition to the securities prescribed in said clause, the bank-book of each depositor, borrowing as aforesaid, be assigned to the bank as collateral security for said loan; and provided further, that in no case shall a greater sum be lent to any depositor than one half the sum due on said bank-book, assigned as aforesaid. 3. To take possession of any real estate on which it holds a mortgage for breach of condition, and for foreclosure, and to proceed with such foreclosure with the same force and effect as if said injunction had not been issued. 4. To purchase any real estate which it shall sell in foreclosure of any mortgage, when-

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ever the power of sale in the mortgage permits such purchase. 5. To invest the proceeds of any foreclosure sale of real estate in a mortgage or mortgages of the real estate so sold, in conformity with the St. of 1876, *c.* 203. 6. To sell and convey any property which it may hold by foreclosure or release of the equity of redemption by the owners thereof; provided, however, that the terms of the sale be first approved in writing by the board of commissioners of savings banks. 7. To pay taxes on property held by it in fee or in mortgage, and purchase and extinguish any tax-title, when it shall deem it necessary for the protection of its property, and to do any and all other things which it shall deem necessary for the management, care and preservation of its property."

The injunction, thus modified, was continued in force until May 23, 1878, when the court made a decree "that the injunction heretofore issued in the said cause be, and the same hereby is, modified so that said corporation, its officers and agents, shall have no further authority to collect and receive moneys due to the said corporation, and, in payment thereof, to give receipts therefor, and release, discharge, assign or otherwise convey to the debtor any property or estate held by said corporation as security therefor; and that the said injunction, so far modified, be, and the same is hereby, made absolute and perpetual." The decree also appointed receivers, who entered upon the performance of their duties, and have ever since been winding up the affairs of the corporation.

The treasurer of the Commonwealth assessed upon the corporation a tax of three eighths of one per cent on the average amount of its deposits for the six months preceding May 1, 1878, and on May 25 gave notice to its treasurer, who was one of the receivers, of the tax, and required payment thereof within ten days after the first Monday of June then next ensuing. The receivers deny the authority of the treasurer of the Commonwealth to assess the above tax while the corporation was under injunction, and have refused to pay the same.

G. Marston, Attorney General, & *F. H. Gillett*, Assistant Attorney General, for the petitioner.

G. A. King, for the receivers. The power of the Legislature to impose such a tax as that in question is only to be justified

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on the ground that it is a tax upon the value of the franchise of the corporation on the first day of May, or, in other words, that it is a tax on its capacity to transact business on that day; and the extent of its capacity can be properly determined by the amount of its business during the preceding six months. *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 428. *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493. It was therefore held in the latter case that if a savings bank was, during the six months prior to the first day of May, perpetually prohibited from transacting business, and this prohibition continued on that day, it was not liable to be taxed. The reasons of that decision apply to the case at bar.

This bank was incorporated by the St. of 1831, *c.* 28, for the purposes of receiving and investing deposits, and of dividing the income among the depositors. In *Commonwealth* v. *People's Five Cents Savings Bank*, 5 Allen, 433, Chief Justice Bigelow, speaking of savings banks, says: "The main object for which they are instituted and clothed with corporate powers is, that they may receive on deposit for the use and benefit of the depositors all sums of money offered for that purpose." On May 1, 1878, and for the six months previous, the defendant corporation was prohibited from exercising the main object of its being. It could only maintain its organization and pursue some limited methods of action to secure the funds in its hands against loss. In this condition of things, it cannot be contended that the bank could transact business on the first day of May, or for the six months preceding; and a tax of this kind on a corporation is based upon "the exercise of all the rights and privileges enjoyed by the corporation in the conduct of its business." *Attorney General* v. *Bay State Mining Co.* 99 Mass. 148, 153.

The tax is on the present capacity of a bank to transact business, not on the possibility that it will in the future have such privilege. The tax is on the average amount of deposits during the preceding six months; and this assumes that the deposits would vary by new deposits being received and old ones paid out. Again, the remedy provided by the St. of 1862, *c.* 224, § 11, for the non-payment of such a tax, is by an action of contract by the treasurer in the name of the Commonwealth, and it

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is further provided that the corporation may be restrained by injunction from the further prosecution of its business until the tax is paid. It is clear that in the case at bar an action of contract would not lie, and the further provision cannot apply to a bank already restrained.

ENDICOTT, J. This case is to be distinguished from *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493. At the time when the tax in that case was assessed and accrued, the Lancaster Bank was in the hands of receivers and perpetually prohibited from transacting the business for which it was incorporated, and deprived of the right to exercise its franchise, and of the profits and benefit to be derived therefrom. As the bank had practically ceased to exist, and could no longer enjoy the privilege of transacting any business, it was held that no tax could be collected.

But a very different state of facts is presented here. The respondent was brought before the court, upon the application of the Commonwealth, to show cause why a perpetual injunction should not issue and receivers be appointed. A temporary injunction was issued pending the hearing, and at the hearing the injunction was not made perpetual, receivers were not appointed, but the bank was allowed to remain in the hands of its officers, and to be managed by them under certain restrictions. They were not allowed to receive deposits, or to pay depositors; their power to make investments was limited to certain specified securities; and, in the sale and conveyance of real estate, held by foreclosure or release of the equity of redemption, the terms of sale were subject to the approval of the bank commissioners. In all other matters the officers of the bank could do what they thought necessary for the management, care and preservation of the property, subject to the further order of the court.

It is obvious that this course was adopted for the purpose of enabling the bank to continue its business, and in the expectation that under its own officers, and in the manner pointed out, it would be relieved from its embarrassment. It was not absolutely deprived of the right to exercise its franchise, or of the profit and benefit to be derived therefrom, but it was restricted in its power to make investments, to add to its liabilities, or to diminish its assets, could sell real estate only with the approval

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of the bank commissioners, and was subject to the further orders of the court.

It was in this condition on May 1, 1878, when the tax accrued under the Sts. of 1862, c. 224, and 1868, c. 315. Whether the limited and temporary injunction would be removed, or a perpetual injunction and the appointment of receivers would become necessary, was then uncertain. Until such a perpetual injunction issued, the bank was still a savings bank, in the exercise of its corporate powers under certain temporary restrictions imposed by the court. It was therefore liable to pay the tax provided in the statutes, and cannot be relieved from this obligation because afterwards the court found it necessary to issue a permanent injunction and appoint receivers to wind up its affairs. *Decree accordingly.*

WILLIAM PATTERSON *vs.* WILLIAM G. CLARK.

Suffolk. March 4. — May 12, 1879. MORTON & ENDICOTT, JJ., absent.

If the parties to an illegal wager deposit money with a stakeholder, and, after the wager is decided against one of the parties, he contends that he is the winner, demands the whole of the deposit, and forbids its payment to the other party, but does not demand the return of his half of the deposit, he cannot maintain an action for such half against the other party, after the stakeholder has paid the whole deposit to the winner, although the latter received it with knowledge that the plaintiff had forbidden its payment to him.

CONTRACT for money had and received. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

In November 1876, a wager upon the result of the then ensuing presidential election was proposed between the plaintiff and the defendant, and each thereupon deposited with one Maloney, as stakeholder, the sum of $50, the whole to be paid by Maloney to the winner according to the terms of the wager, as he determined it. Maloney, before the decision of the Electoral Commission, proposed to the plaintiff that the latter should withdraw his one

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half of the deposit, but the plaintiff declined to do this, and requested Maloney to await the decision of the Commission. In March following, after the decision of the Commission, Maloney having told the plaintiff that he should pay the $100 deposited with him to the defendant as winner, the plaintiff objected to the money being so paid, contended that he was himself the winner, and demanded the payment of the $100 to himself as such winner, but this demand Maloney refused to comply with. The plaintiff, before bringing this action, never demanded the return to him of his half of the deposit, but forbade Maloney to pay the whole of the money to the defendant as winner. After the above conversation, Maloney paid over the $100 to the defendant, as winner of the wager, the date of such payment being March 5, 1877. The defendant, at the time of receiving the money, knew that the plaintiff had forbidden its payment to him. If, upon the above facts, the plaintiff was entitled to recover, judgment was to be entered for him in the sum of $50 and interest; otherwise, judgment for the defendant.

W. W. Dodge, for the plaintiff, cited *Love* v. *Harvey*, 114 Mass. 80; *Fisher* v. *Hildreth*, 117 Mass. 558.

W. E. L. Dillaway, for the defendant.

LORD, J. There is no doubt that the plaintiff had the right, at any time before the stakeholder had parted with the money, to revoke the wager, and demand the fifty dollars which he had illegally deposited with him. Upon the agreed statement of facts, it is certain that he never revoked his authority to pay the whole one hundred dollars to the winner. On the other hand, he contended that he was entitled himself to the whole one hundred dollars as winner. He contended throughout that the stakeholder, whom he had made his judge in the illegal transaction, should decide in his favor. Until the money was actually paid over, instead of revoking the authority of the stakeholder, he was invoking that authority to carry out the illegal transaction in such mode as would give him the entire benefit of the wager. It was not until after the transaction was fully completed, and while he was *in pari delicto*, that he made any attempt to rescind the wager or revoke the authority of the stakeholder to pay the money to the winner, as the stakeholder determined it. It was then too late.

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The position of the plaintiff, that "the authority given by the plaintiff for the consummation of the illegal act was dependent upon a contingency, without consideration, and revocable, and was revoked before payment, according to the terms of the illegal contract," if tenable, would require of this court, as a court of appeal, to determine whether the stakeholder had properly exercised his judicial discretion in carrying into effect the illegal contract. It is necessary only to state the question thus presented for our decision to demonstrate the impossibility of interference by the court. The law has been too long and too well settled in this Commonwealth to require a citation of the numerous authorities, all uniform, that the court will not render its assistance to disturb executed transactions done in violation of law, the parties to which are *in pari delicto*.

Judgment affirmed.

SAMUEL W. SPOFFORD *vs.* PETER NORTON.

Suffolk. March 27. — May 13, 1879. COLT & AMES, JJ., absent.

An action against the maker of a promissory note can be maintained in the name of a person who has no beneficial interest in the note, but sues at the request of the owner; and evidence is incompetent in defence of the action which would be incompetent to impeach the title of the owner.

CONTRACT on a promissory note for $100, dated August 11, 1877, signed by the defendant, payable to the order of Jesse Wadleigh, and by him indorsed. Trial in the Superior Court, before *Brigham*, C. J., who, after verdict for the plaintiff, reported the case for the consideration of this court in substance as follows:

There was evidence on the part of the defendant that he gave the note in suit in payment of a horse purchased by him in June 1877, of Wadleigh, who was foreman of the stable of S. A. Tuttle, the owner of the horse; that the horse was delivered to and disposed of by the defendant; that subsequently, on August 11, 1877, the note was made and delivered to Wadleigh; that, before the maturity of the note, it was purchased by Marshall A. Lewis, without notice of the facts attending the making and considera-

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tion thereof, who held it until near its maturity, when he put it in a bank for collection; that the note, not being paid at maturity, was protested for non-payment, and Lewis put it into the hands of an attorney for collection, with no directions as to the time of suit, but with authority to bring suit upon the note; that subsequently Lewis asked permission of the plaintiff to bring an action on the note in the plaintiff's name, and the plaintiff authorized such an action; and that thereupon this action was brought, the plaintiff not having then or since any property in the note, or any relation thereto, except as above stated.

The defendant also offered to prove that he purchased the horse, some weeks prior to the giving of the note in suit, of Wadleigh, acting as the agent of Tuttle, the owner of the horse; that Wadleigh took the note in his own name on account of the former transaction of the purchase of the horse; that Wadleigh demanded that the note should be made payable to him because Tuttle had gone into bankruptcy; that Wadleigh's motive in so taking the note was to prevent Tuttle's assignee from getting possession of the horse; and that, prior to the making of the note, Tuttle's wife demanded payment for the horse, it being then in the possession of the defendant under the sale by Wadleigh to him. There was no offer to show that Tuttle knew of Wadleigh's demand to have the note made payable to him.

The judge rejected the above offer of evidence, against the defendant's objection; and directed a verdict for the plaintiff for the amount of the note.

If the evidence offered was competent, or if, upon the facts reported, the defendant had a defence to the action, a new trial was to be ordered; otherwise, judgment was to be entered on the verdict.

O. B. Mowry, for the defendant.

J. M. Way, for the plaintiff.

SOULE, J. It is no ground of defence that the plaintiff has no beneficial interest in the note sued on, and will be bound to account to the real owner for the proceeds of any judgment recovered on it. *Little* v. *Obrien*, 9 Mass. 423. *Brigham* v. *Marean*, 7 Pick. 40. *Fairfield* v. *Adams*, 16 Pick. 381. *Beckman* v. *Wilson*, 9 Met. 434. *Wheeler* v. *Johnson*, 97 Mass. 39. *National Pemberton Bank* v. *Porter*, 125 Mass. 333.

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The plaintiff sues at the request and for the benefit of Lewis, who purchased the note before maturity and without notice of any of the facts which the defendant contends show that it was fraudulently obtained and is without consideration. Lewis, therefore, held the note by a title which was valid against all defences now set up by the defendant. He has not parted with his interest. He brings this action in the name of his agent, still holding control of the note. No defence is available which could not be maintained against a suit in his name. *Baxter* v. *Little*, 6 Met. 7. Indeed, we understand the position of the defendant at the argument to have depended on the assumption that the action could not be maintained unless the plaintiff was beneficially interested in the note; and, as that proposition fails, the argument which rested on it falls with it. The evidence offered and rejected at the trial in the Superior Court was incompetent to impeach the title of Lewis, and was, therefore, incompetent in defence to the action in his behalf in the name of the plaintiff. According to the terms of the report there must be

Judgment on the verdict.

FIRST NATIONAL BANK OF CLINTON *vs.* SAMUEL BRIGHT.

Suffolk. March 18. — May 28, 1879. AMES & LORD, JJ., absent.

Under the Gen. Sts. *c.* 142, §§ 11, 16, 42, facts stated upon information and belief in the answers of a trustee are to be conclusively taken as true, although an adverse claimant has appeared.

MORTON, J. This is a writ of *scire facias* against the defendant as the alleged trustee of one John W. Draper. The defendant was defaulted and adjudged a trustee in the original action; but it was competent for him to answer and prove in this suit any matter necessary and proper for his defence. Gen. Sts. *c.* 142, § 42. *Fay* v. *Sears*, 111 Mass. 154.

It appears by his answers that, at the time of the service of the original writ upon him, he was owing a balance upon his promissory note, dated February 6, 1861, payable in one year

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from date to the order of Otis Shepard, and secured by a mortgage of real estate, and that said note and mortgage had been assigned to said Draper. He also stated in his answer that Marcus J. Delano claimed that the note and mortgage had been transferred to him by Draper before the service of the original writ. Delano was thereupon admitted as a claimant under the statute. Afterwards the defendant, by leave of court, filed an amendment to his answers, in which he states, "I was informed before judgment was rendered in the original action, and I believe that before the service of the plaintiff's writ upon me in the original action, said note had been transferred to said Delano by said Draper for a valuable consideration, and that at the time of the service of said writ upon me said Draper had no claim upon me on account of said note."

The plaintiff thereupon filed additional allegations averring that said note and mortgage had not been assigned to said Delano for a valuable consideration, but were the property of said Draper. The court ruled "that the allegations did not relate to facts not stated or denied in the answer of the defendant, and so excluded proof of the averments as immaterial." The only material question in the case is as to the correctness of this ruling, because both parties concede that, if this ruling is right, the other exceptions alleged in the case are immaterial.

The statute provides that the answers and statements sworn to by a trustee shall be considered as true, in deciding how far he is chargeable, but either party may allege and prove any other facts, not stated nor denied by him, that may be material in deciding that question. Gen. Sts. *c.* 142, § 11.

It has been repeatedly held that, where a trustee makes a full disclosure and answers all pertinent interrogatories, all facts which he states upon his information and belief are to be taken as true, as well as those which he states upon his own knowledge. *Shaw* v. *Bunker*, 2 Met. 376. *Bostwick* v. *Bass*, 99 Mass. 469. *Fay* v. *Sears*, 111 Mass. 154.

The plaintiff contends that, as these are cases in which there was no claimant before the court, they do not govern the case at bar. But it is clear that the Legislature intended that, in cases in which a claimant appears, the same rule as to the conclusiveness of the trustee's answers should apply, as it is provided

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that the claimant can only allege and prove any facts not stated nor denied by the supposed trustee. Gen. Sts. c. 142, § 16.

In the case at bar, the defendant took the responsibility of stating under oath, upon his information and belief, that the note in question had been transferred to Delano, for a valuable consideration, before the service of the original writ upon him. If he did this corruptly and in collusion with the claimant, he would be liable to the plaintiff for the full amount of his debt; but it is not competent for the plaintiff, in this suit, to prove that the facts thus stated by the defendant are not true.

The ruling of the Superior Court was therefore correct.

Exceptions overruled.

G. W. Morse & J. C. Lane, for the plaintiff.

T. E. Grover, for the defendant.

CHARLES R. McLEAN, executor, *vs.* THOMAS C. ROBERTSON.

Suffolk. March 26. — May 28, 1879. AMES & LORD, JJ., absent.

A testatrix by her will directed her executor to sell by public auction "my house and land situated on L. Street, the proceeds thereof to be distributed as follows: To R., a former partner of my husband, the sum of two hundred dollars, provided that it can be proved that it was loaned to my said husband to be put into the first money paid for this house, my executor to decide whether it is or is not proved that the money was so given." The will then gave eleven legacies to different persons, using in each case the words, "I give and bequeath," or "I give," followed by this clause: "All these specific bequests of money, in the event of there not being enough to pay them all in full, each one is to be paid in proportion to the sum left to him, and the event of any surplus to be shared in like manner." The executor decided that the money was so lent by R. to the husband of the testatrix. *Held*, that the provision in favor of R. was not subject to abatement *pro rata* with the other bequests, but that he was entitled to be paid the sum of $200 in full out of the proceeds of the sale of the house.

APPEAL by Thomas C. Robertson from a decree of the Probate Court, ordering distribution of the estate of Lucy Saunders, the seventh clause of whose will was as follows: "I give and bequeath, or rather I wish that my house and land situated on Liverpool Street be sold at public auction by my executor, and I hereby empower him to sell it in that manner, the proceeds

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thereof to be distributed as follows: To Thomas Robinson, a former partner of my divorced husband, the sum of two hundred dollars, provided that it can be proved that it was loaned to my said husband to be put into the first money paid for this house, my executor hereinafter named to decide whether it is or is not proved that the money was so given." The will then gave eleven legacies to different persons, mostly relatives, using in each case the words, "I give and bequeath," or "I give," followed by this clause: "All these specific bequests of money, in the event of there not being enough to pay them all in full, each one is to be paid in proportion to the sum left to him, and the event of any surplus to be shared in like manner."

The Probate Court, on petition of the executor, praying for a decree of distribution of the balance of the estate in his hands among the persons entitled thereto under the will, made the fol lowing decree:

"It appearing by the account of said executor, that there is in his hands a balance of the estate of said deceased, not sufficient to pay the legacies of said deceased in full, and it further appearing that the legacy to Thomas C. Robertson, called in the will Thomas Robinson, was a conditional legacy, which has been determined in favor of said Robertson by said executor, thereto duly authorized by said will, it is ordered that said balance be distributed, *pro rata*, among the legatees under said will, including said Thomas C. Robertson."

Robertson appealed from this decree, alleging as reason of appeal that he should be paid in full the sum of $200. *Colt*, J., affirmed the decree; and Robertson appealed to the full court.

I. D. Van Duzee, for the appellant.

The appellee submitted the case without argument.

MORTON, J. The general rule is, that, where there is a deficiency of testamentary assets, after the payment of debts, expenses and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. But if the chances of a deficiency are anticipated and provided for by the testator, his directions will govern, and the loss must be borne by those upon whom he places it. *Towle* v. *Swasey*, 106 Mass. 100. If testamentary gifts are founded upon some valuable consideration, such as a relinquishment of the widow's

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right of dower or a gift in performance of a valid contract, the general rule does not apply, but such legatees take as purchasers, and are entitled to priority over the general legatees.

In the case at bar, if the testatrix had made no provisions looking to a deficiency of assets, it is difficult to see how the legacy to the appellant could claim priority over the other legacies. It was not given in pursuance of any valid contract, and was not founded upon any consideration. But the testatrix made provisions in the will for a possible deficiency, and the question is whether she intended that the legacy to the appellant should be subject to abatement *pro rata* with the general legacies.

The amount given to him was intended to be in repayment of a like sum lent to the husband of the testatrix, and applied by him towards the payment for the house belonging to her. Though she was not under any legal liability to pay it, she seems to have recognized it as an equitable claim upon the proceeds of the house when sold. By the seventh article of her will she directs her executor to sell the house, "the proceeds thereof to be distributed as follows." Then follows the clause under which Robertson claims.

The will then gives eleven legacies to different persons, mostly relatives, using in every case the words, "I give and bequeath," or "I give," — language not used, it is to be observed, in the provision for Robertson. Then follows this clause: "All these specific bequests of money, in the event of there not being enough to pay them all in full, each one is to be paid in proportion to the sum left to him, and the event of any surplus to be shared in like manner." The words "all these specific bequests of money" might include the provision for Robertson, but they more naturally apply to the eleven bequests immediately preceding, which the testatrix has described as gifts or bequests. The provision as to the distribution of the surplus, if any, furnishes strong evidence that she did not intend to include the appellant within this clause. He was to be paid a fixed sum, determined by the amount which he had advanced towards paying for the house. There is nothing in the will or in the relations existing between the testatrix and Robertson which would justify the inference that she intended that he should in any event be paid more than that sum.

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Upon the whole case, we are of opinion that the scheme and purpose of the testatrix was to have the house sold, to pay to Robertson the amount advanced by him, and to divide the residue of the proceeds, more or less, among the various legatees named in proportion to the sums named as bequests to them severally; and that it was not her intention that the sum left to the appellant should be subject to abatement if there was a deficiency of assets. *Decree reversed.*

ABBY G. SULLIVAN *vs.* CITY OF BOSTON.

Suffolk. April 1. — May 28, 1879. AMES & LORD, JJ., absent.

Evidence that a city leaves a part of a school-house lot, belonging to the city, and adjoining a highway, open and graded uniformly with the sidewalk for convenience of access to the school-house, is not sufficient to show that such part of the lot is within a footpath dedicated to the public; such open space is not "a way entering on and uniting with" the public highway, within the Gen. Sts. c. 43, § 83; and the city is not liable to a scholar injured by a defect therein.

TORT for personal injuries occasioned to the plaintiff, on February 14, 1878, by a defect in a highway. Answer, a general denial. At the trial in the Superior Court, before *Allen*, J., the following facts appeared in evidence:

Prior to 1875, the defendant purchased a parcel of land on the corner of Prospect Street and Edgeworth Street in Boston, and, during the years 1874 and 1875, built a school-house thereon. Those streets were, at the time of such purchase, and have ever since been, public streets of said city. Between the school-house and the line of the sidewalks on those streets was a portion of the school-house lot, not enclosed by a fence, but laid out, graded and paved uniformly with said sidewalks, in accordance with plans of the architect of the school-house and grounds, and with the contract under which the school-house was built. In 1875, the school-house and grounds, so laid out and completed, were accepted and paid for by the city, and since then there has been nothing to separate, or to indicate the line between, the unenclosed portion of the school-house lot and the streets, but such

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space has been open to public use and used by scholars and others going to and from the school-house, and by all persons having occasion to pass over such space. None of the requirements of the Gen. Sts. *c.* 43, § 83, have been complied with, nor has any action under the St. of 1867, *c.* 241, been taken in relation to the unenclosed portion of the land. A janitor, employed by the school committee of, and paid by, the city, has been in charge of the school-house and grounds since 1875, and it was part of his duty to keep said space and the sidewalks clear of ice and other obstructions, and he has usually cleared the snow from the same. The alleged defect consisted of lumps of ice, between which the plaintiff testified that her foot was caught, and she received the injuries complained of.

There was evidence tending to show that the plaintiff was a scholar in the public school, passing from the school-house door over the unenclosed space to the sidewalk, and was in the exercise of due care; that the defect had existed more than twenty-four hours; and that the defendant was duly notified of the time, place and cause of the injury.

Upon these facts, the judge ruled that the plaintiff could not recover; directed a verdict for the defendant; and by consent of parties reported the case for the determination of this court.

H. W. Bragg, for the plaintiff.

E. P. Nettleton, for the defendant.

MORTON, J. The place where the plaintiff was injured was not within the limits of a highway located and laid out by the city of Boston. There is no evidence which would justify the jury in finding that it was within a footpath dedicated to public use and travel by the city. It was within the school-house lot or yard, left open and graded for convenience of access to the school-house. The fact that this open yard or space was not separated from the sidewalk by a fence is not sufficient to show that it was dedicated to general public use as a part of the system of the highways of the city. *Stockwell* v. *Fitchburg*, 110 Mass. 205.

The provisions of the Gen. Sts. *c.* 43, §§ 82, 83, do not apply to the case. As stated in *Oliver* v. *Worcester*, 102 Mass. 489, the reason of these provisions "obviously was, that, while no new highways or town ways were to be made chargeable upon

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cities and towns, unless regularly laid out in the manner prescribed by law, there might be ways opened and laid out, connected with the public ways, and apparently themselves public ways, which travellers would have no means of knowing were not legally laid out and kept in repair as such;" and therefore cities and towns were required to close up such ways, or caution the public against entering on them, under the penalty of being liable for defects therein if they failed to do so. The open space in front of the school-house cannot in any just sense be called "a way entering on and uniting with" the public highway. The case is not within the letter or the spirit of the statute.

It follows that the defendant is not responsible, because the injury to the plaintiff was not caused by a defect in a highway, or in a way connected with a highway, for which it is liable. As we have before said, the place where the injury happened was in the school-house yard or lot, and, even if the city allowed this to be defective and dangerous, it is not liable therefor. *Hill* v. *Boston*, 122 Mass. 344. *Bigelow* v. *Randolph*, 14 Gray, 541.

Judgment on the verdict.

DANIEL MURPHY *vs.* JOHN NOLAN.

Middlesex. January 8. — May 8, 1879. COLT & ENDICOTT, JJ., absent.

A certificate of license for the sale of intoxicating liquors, granted by the mayor and aldermen of a city, recited that it was granted and accepted upon the express condition that the licensee should in all respects fulfil and conform to all the conditions or requirements of the St. of 1875, c. 99; and that, for breach of any of its conditions or requirements, the license should become forfeited, null and void. It was signed by the mayor and city clerk, and below their signatures followed an "extract from chapter 99 of acts of 1875," § 6 being quoted in full. *Held*, that the license was substantially in the form required by the statute; and that the licensee, having fully complied with the conditions of the license, and having displayed it on his premises according to law, was legally licensed.

CONTRACT upon an account annexed for intoxicating liquors sold and delivered. The case was submitted to the Superior

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Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts in substance as follows:

The defendant bought of the plaintiff at his shop the goods mentioned in the declaration, and he owes the plaintiff the amount claimed, if the plaintiff was duly licensed to sell spirituous and intoxicating liquors. All the items in the plaintiff's bill of particulars were for liquors sold not to be drunk on the premises, and were not drunk on the premises, and were purchased between June 26, 1875, and July 11, 1875.

On June 11, 1875, the mayor and aldermen of Lowell voted to grant a license to the plaintiff, subject to the conditions, requirements and liabilities of the St. of 1875, *c.* 99; and a paper, of which the following is a copy, was furnished to the plaintiff: "City of Lowell. 1875–76. Fourth Class. No. 100. License to sell liquors of any kind not to be drunk on the premises. This certifies that the mayor and aldermen of the city of Lowell hereby grant a license to Daniel Murphy, doing business at No. 68 Suffolk Street, in said city, as grocer, to sell liquors of any kind, not to be drunk on the premises, until May 1, 1876. This license is granted and accepted upon the express condition that the person or persons above licensed, shall in all respects, fulfil and conform to all the conditions or requirements of chapter 99 of the Acts of the Legislature of Massachusetts of 1875, entitled 'An Act to Regulate the Sale of Intoxicating Liquors;' and that, for breach of any of its conditions or requirements, this license shall become forfeited, null and void. In testimony whereof, the undersigned have hereunto affixed our official signatures this eleventh day of June, A. D. 1875. Francis Jewett, Mayor. Samuel A. McPhetres, City Clerk." Then followed an "extract from chapter 99 of Acts of 1875," section six being quoted in full.

All the conditions of the license have been fully complied with; it has never been revoked; and the plaintiff furnished a satisfactory bond, as required by the statute.

If, on these facts, the plaintiff was duly licensed, judgment was to be entered for the plaintiff for the sum claimed; otherwise, for the defendant.

J. F. McEvoy, for the plaintiff.

W. H. Anderson, for the defendant.

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SOULE, J. The certificate of license furnished by the authorities of the city of Lowell to the plaintiff complies substantially with the requirements of the St. of 1875, *c.* 99. The conditions of the license are not recited in full in the words of the statute, above the signatures of the mayor and city clerk; but above those signatures is a statement that the license is granted and accepted upon the express condition that the licensee shall in all respects fulfil and conform to all the conditions or requirements of chapter 99 of the Acts of the Legislature of Massachusetts of 1875, entitled "An Act to regulate the Sale of Intoxicating Liquors," and that for breach of any of its conditions or requirements the license shall become forfeited, null and void. Then follows, on the same sheet, the full text of the conditions contained in the statute, headed by the words "Extract from chapter 99 of Acts of 1875." This certificate of license, with the extract from the statute, was displayed in a conspicuous place on the plaintiff's premises. Whether we regard the extract from the statute as a part of the certificate of license, or not, that certificate showed expressly that it was held subject to the conditions and requirements of the statute, which is what the statute requires that it should show. Beyond this there is nothing in the statute as to the form of the license in this particular. And if it be said that the purpose of the statute is that the instrument, when displayed on the licensed premises, shall be in such terms as to show to all persons who examine it what the conditions of the license are, it is plain that any one who examined the paper displayed in the plaintiff's premises had before his eyes the same means of learning those conditions as if they had been printed above the signature of the mayor.

The license having been duly voted and granted, and paid for, and its terms and conditions fully complied with by the plaintiff in all other respects, and he having, according to the requirements of the law, displayed on the premises the certificate furnished him by the proper authorities, which was in a form substantially in accordance with the provisions of the statute, he was legally licensed. *Judgment for the plaintiff.*

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SOPHIA E. MELLEN *vs.* GEORGE H. MORRILL.

Norfolk. January 21. — May 22, 1879. AMES & SOULE, JJ., absent.

The owner of a building, leased to a tenant who occupies it, is not liable to a person who, in passing along a walk leading from the street to the building, for the purpose of transacting business with the tenant, is injured by falling down an embankment adjoining the walk, although the estate was in that condition prior to the letting.

TORT. At the trial in the Superior Court, before *Pitman*, J the plaintiff offered to prove the following facts:

In February 1877, the defendant was the owner of a dwelling-house in Norwood, which he had let by parol to a tenant, who occupied it for a dwelling-house and market. The walk or path leading from the street to the front door of the building was unsafe and dangerous, and was in that condition prior to the letting of the building, and its condition was known to the defendant. The plaintiff in the night-time, while in the exercise of due care, was passing along this path or walk, for the purpose of calling upon the tenant and settling an account with him, when, in consequence of the dangerous or unsafe condition of the walk, she was precipitated down an embankment about eight feet, and received the injuries complained of.

The judge, by consent of parties, before verdict, reported the case for the determination of this court. If, upon proof of the above facts, it would be competent for the jury to find for the plaintiff, the case was to stand for trial; otherwise, judgment was to be entered for the defendant.

J. E. Carpenter, for the plaintiff.

A. B. Wentworth, for the defendant.

MORTON, J. It appears that the plaintiff was injured by falling down an embankment adjoining a walk leading from the street to the door of a building owned by the defendant but leased to a tenant. The accident happened in the night-time. There was no defect in the walk itself. It was rendered dangerous, if at all, by the want of a railing, or by the absence of a light or some other warning. The plaintiff can hold the defendant liable only upon the ground that he was guilty of negligence towards her.

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The occupier of a building, who negligently permits the building or the access to it to be in an unsafe condition, is liable for an injury occasioned thereby to a person whom he by an invitation, express or implied, induces to enter upon it. He is liable because it is negligence in him to invite a person to enter upon a dangerous place without proper warning. *Sweeny* v. *Old Colony Railroad*, 10 Allen, 868. *Carleton* v. *Franconia Iron & Steel Co.* 99 Mass. 216. But the defendant was not the occupier of the land, and did not, expressly or impliedly, invite the plaintiff to enter upon it. He had leased it to a tenant, and there is nothing to show that he retained any control over the walk, or any right to direct the purposes for which the premises should be used.

The fact that the walk was in the same condition before the demise is not material. The defendant did not guarantee that the premises should be safe for all the uses to which the tenant might put them. The tenant alone had the right to determine the purposes for which he would use the premises. If he used them so as impliedly to invite people to visit them in the night it was his duty to make them safe by a railing, or by a light or other warning. It was not the duty of the landlord, and indeed he would not have the right, without the consent of the tenant, to do this.

We are of opinion that, upon the facts offered to be proved in this case, if any one is liable, it is the tenant, and not the defendant. *Leonard* v. *Storer*, 115 Mass. 86.

Judgment for the defendant.

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SUPPLEMENT.

Opinions of the Justices to the Senate and House of Representatives.

Under the Constitution of the Commonwealth, the Senate has an equal right with the House of Representatives to originate an inquiry into the returns made from the towns, for the purpose of settling a valuation, and of concluding on the proportion of ratable property within each town.

On February 18, 1781, the following order was passed by the Senate, and on February 20 by the House of Representatives:

Whereas it is provided by the Constitution that "all money bills shall originate in the House of Representatives," and the House are of opinion that, agreeable to the spirit of the clause above recited, it is their exclusive right and duty to originate an inquiry into the returns made from the several towns and plantations for the purpose of settling a valuation, and finally to conclude on the proportion of ratable property within each town and plantation in this state; and whereas the Senate are of opinion that the above recited clause does not apply to the settlement of a valuation, and therefore, that, by virtue of the equal rights and powers which are given by the first section of the first chapter in the Frame of Government to the two branches of the Legislature, the Senate have an equal right and concern with the House of Representatives in originating and completing the settlement of a valuation; and whereas it is essential to the public interest that the two branches of the Legislature should, on the present occasion, unite in their construction of the Constitution without delay; Therefore Resolved, that in order hereto the Judges of the Supreme Judicial Court be and they hereby are directed to deliver in writing to each House of the Legislature, on or before the twenty-second day of February instant, their respective opinions on the above questions in debate.

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On February 22, 1781, the Justices of the Supreme Judicial Court came into the Senate and delivered their several opinions in writing, as follows:

May it please your Honors:

In obedience to the special order of the General Court of the twentieth instant, to the Justices of the Supreme Judicial Court, (with which they are honored,) directing them to deliver their respective opinions in writing to each House of the Legislature, upon their several powers respecting the list of valuation by the new Constitution; I have endeavored for myself to form an opinion, as well as I could in the short space allowed.

The question, as far as I understand the matter, amounts to this, viz. Whether the Senate have an equal right with the House of Representatives in examining the lists of valuation returned from the several towns, and adjusting the same, as a rule for their future conduct in making laws imposing public taxes?

In answer to which I would observe that, by the first article of the first section of the first chapter upon the Frame of Government, the power of legislation is lodged in both Houses, each having a negative upon the other. By the fourth article of the same chapter, the General Court are empowered to impose and levy proportionable assessments and taxes upon all the inhabitants, &c. And by the same article it is directed, that, while the charges of government shall be assessed on the polls and estates in the manner that has hitherto been practised; in order that such assessments may be made with equality, "there shall be a valuation of estates within the Commonwealth taken anew once in every ten years at least, and as much oftener as the General Court shall order." By the second section of the same chapter, the Senators are to be elected by the districts; who are to be proportioned upon them according to the taxes paid by such districts, and the inhabitants of the several towns, (as also of unincorporated plantations which are taxable,) having the requisite qualifications of voters, are to have a voice in electing them.

Now, as the Senate are elected by the people and represent them; as they have a joint power with the other branch to order a general valuation, whenever it shall be taken; as they have a joint power, also, expressly to impose and levy proportional as

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sessments and taxes, in order to which it seems necessary that they should judge of the rectitude of the proportion by which such assessments and taxes are to be regulated; I conclude that the Senate must have a right to examine the lists of valuation returned, and adjust the same for themselves, or to concur in such adjustment; and that, whether it be considered as an act of legislation, or only as a necessary step to legislation in imposing proportional public taxes — the latter of which I am rather inclined to think, as to originating the inquiry into the lists of valuation — the clause that directs that "all money bills shall originate in the House of Representatives" does not appear to me to relate to it. For I suppose a money bill to be a bill imposing a direct tax on the people; which the inquiry into the lists of valuation and settling the same cannot so properly be said to be, as it may be called the settling a rule of proportion, by which each branch of the Court will be governed when they proceed to pass money bills. If this be the case, then, there being no other clause in the Constitution establishing a precedence in this particular, the right of both branches must be equal.

An objection to what I have said may arise from the practice of the House of Representatives under the former government, who solely settled the valuation, in exclusion of the Council. But as that practice arose probably from a supposed resemblance of the Council to the House of Lords in the British government, who are not elected by the people, and do not represent them, but are a distinct body, having a distinct interest from the people, I apprehend no application can thence be made to a government formed upon a plan so different and popular as ours is.

As to that clause in the said fourth article, viz. "While the public charges of government, or any part thereof, shall be assessed on polls and estates in the manner that has hitherto been practised," it does not appear to me to relate to the former practice of the House in settling the valuation lists, but to the mode of raising government charges, viz. upon polls and estates, rather than by duties and excises, and by other methods than by a general proportional tax upon the whole people.

I am your Honors' most obedient humble servant,

WILLIAM CUSHING.

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To the Honorable Senate of the Commonwealth of Massachusetts:

Pursuant to your Honors' directions, I have endeavored to consider the subject mentioned in your Honors' resolve as fairly and fully as the very short time allowed me would permit. Perhaps if I had heard all the arguments that have been made use of, I might be of a different opinion. But in obedience to your Honors' command, I must now express my mind on the subject as clearly as I am capable of.

It seems necessary in the first place to consider, whether this settlement of a valuation is an act of legislation, or not. It appears to me not to be an act of legislation, but the framing a rule to direct or assist in legislation. The difference between a rule and a law is this: the latter is binding, and has an obligatory force in it, and the other has not. The settlement of a valuation only binds nobody; for, while it rests there, no duty or obligation is laid on the people; and the Legislature cannot be bound by it, for they may alter or destroy it at pleasure. Therefore it appears to me to be only a rule to assist in legislation.

The act for making inquiry into the estates of the inhabitants is to be considered as an act of legislation, because it obliges the assessors to give in a list of estates in the towns they belong to, and obliges the inhabitants to give in their estates to the assessors; and in that view, and considered as determining the subjects of taxation, it may be considered as a money bill, and ought by the Constitution to originate in the House of Representatives. In the same manner ought a tax bill for collecting money from the several towns to be understood as a money bill, because these may strictly be considered as laws or acts of legislation. But a rule to legislate by is of a different nature.

By the Constitution, "the General Court," consisting of a Senate and House of Representatives, are "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the Commonwealth." Now, in order to do that duty, it is necessary that the Senate and House of Representatives should know the number of inhabitants, and persons resident, and estates lying, within the several towns, &c. in the Commonwealth, which can be only found by the returns from the several

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towns; and no Senator or Representative can be satisfied that he imposes a proportionable assessment on any town, unless he knows the proportion of persons and estates in that town, compared with the persons and estates in the whole Commonwealth; and he has no right to impose any but proportional assessments. So that it appears to me that the Senate and House of Representatives have an equal right to the returns from the several towns, to form a rule for themselves respectively, to legislate by, and impose proportional assessments. Whether the public would be best served by the Senate and House of Representatives joining in forming such a rule is a question of expediency, which I apprehend does not belong to us to determine.

If I am right in what I have advanced, the clause in the Constitution, that "money bills shall originate in the House of Representatives," does not apply, because that respects acts of legislation only, as appears by the clause immediately after, that "the Senate may propose or concur with amendments." I apprehend the ancient usage can have but little weight, because by the last-mentioned clause it appears to be intended to make an alteration in former usages. Formerly the Council were not immediately the representatives of the people, but were subject to a regal negative; now, the Senate are representatives of larger, as the House are of smaller districts. But why there was so strict an adherence to that rule then, I never was able to comprehend; the similarity between the House of Lords in England and our Council was not so great as to warrant it.

The last clause in chapter 1, section 1, "while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised," does not appear to me to have weight, because the words "hitherto practised" seem to refer to the subjects of taxation only, and not to the manner of proportioning the taxes on those subjects; for the same clause directs that a valuation of the estates shall be taken every ten years at least, that the assessments may be made with equality upon those subjects.

I have considered it as my duty to deliver my sentiments with frankness, and trust your Honors will excuse my freedom in consideration that duty is of superior obligation to politeness.

I remain your Honors' most obedient servant,

NATHANIEL PEASLEE SARGEANT.

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May it please the Honorable Senate:

In obedience to the directions of the Honorable Senate of the twentieth instant, respecting the settlement of a rule of valuation, I beg leave to observe, that the power and authority the Council of Massachusetts Bay held under the Charter of William and Mary, respecting money matters, were supposed to be limited to a bare assent or dissent; from the idea that the representative body was confined to the persons immediately elected by the people in their several towns. These deductions were doubtless drawn from the analogy between the Great and General Court of Massachusetts Bay and the Parliament of Great Britain. Therefore precedents under the Charter upon similar occasions are no more a rule of conduct now, than the similarity of the House and Senate under the present Constitution, as to their mode of appointment, to the House of Commons and House of Lords in Great Britain.

It was supposed that the grants of money were the free gifts of the people at large by their representatives, and that there was a degree of unfitness or impropriety in other persons interfering in the quantum or manner of making them. The Senate, by the Constitution, are as much the immediate choice of the people, as the members of the House of Representatives; and are apportioned on the several districts they come from, in proportion to the taxable property contained in the district. And here it may not be amiss to observe that unincorporated plantations (several of which are taxed) have no immediate voice in appointing a representative at the General Court, unless the Senators for the district in which such unincorporated plantations are situated are the representatives.

The General Court of Massachusetts, by a paragraph in the fourth article of the first chapter, are empowered "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the Commonwealth." And in another paragraph in the same article, it is provided, that, in order that such assessments may be made with equality, there shall be a valuation of estates taken anew once in every ten years at the least. And each House having a negative on the other seems to make them

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equally entitled to all the documents necessary to make a proportional assessment upon the ratable property taxed.

By the seventh article in the third section, "All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills." The settling a valuation list, or an inquiry into the ratable property of the government, seems to be a previous business to the originating a money bill, and unless the Senate have a voice in this inquiry, how can they, as one branch of the Legislature, impose and levy proportional assessments? The fixing an invoice or valuation of property that is or ought to be taxable does not appear to me to be originating a money bill in the sense of the Constitution. For after such a valuation is settled and finally adjusted, even on the supposition that both Houses join or concur in doing it, no money is raised, levied or granted by it.

I do not therefore at present see any unconstitutional impropriety in the two Houses joining in fixing and adjusting the valuation; which, in other words, is drawing a comparison, from the returns made into the Secretary's office, between the ability of one town and another in the Commonwealth to pay taxes. But in case the two Houses cannot agree to join in such inquiry, each House has an equal right to inquire for itself.

I am most respectfully your Honors'

Obedient humble servant,

DAVID SEWALL.

To the Honorable the Senate of the Commonwealth of Massachusetts:

May it please your Honors: Being served with a copy of a resolution of both Houses of the Legislature, the preamble whereof sets forth that the House of Representatives are of opinion that it is their exclusive right and duty to originate an inquiry into the returns made from the several towns and plantations, for the purpose of settling a valuation, and finally to conclude upon the proportion of ratable property of each town and plantation in the State; and that the Senate conceive that, by the powers given them in the Constitution, they have equal right and concern with the House in completing the settlement of a valuation; and the resolution directs that the Judges of the Su-

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preme Judicial Court shall deliver in writing to both Houses of the Legislature, upon this day, their respective opinions upon the above question; I am very sensible of the honor done to the Bench by the command of the Legislature in this instance; but am obliged to say, that in a question so complicated, and of such magnitude, I could have wished that a longer space than two days had been allowed me.

In the address of the late Convention to their constituents, it is expressly said, that the Senate are designed as the representatives of the property of the State; but that address being an act neither originating with nor concurred by the people, it can be no part of the Constitution. Nevertheless, the provision that the number of Senators from each district shall be in proportion to the taxes there paid strongly holds up the same idea.

The Constitution provides that the Legislature shall "impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the Commonwealth;" that "all money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills;" and that, "while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised; in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth taken anew once in every ten years at least, and as much oftener as the General Court shall order." Upon these clauses I conceive that the question must be determined.

The taking a valuation, in its first progress, is but an inquiry where the ratable property is; and here the entire powers of legislation are to be drawn into exercise; in the first place, to declare what species of property shall be subject to taxation; and secondly, to direct the mode of investigating where that property is, or what proportion of it is held by each town, and to compel a compliance in the subject with such mode as they are pleased to direct; and this I think is well supported by the clause which provides for the taking a valuation.

But when the evidence of what property is held by each shall be returned to the office of the Secretary, it is to be arranged

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and adjusted, not by an act of legislation, but as a basis whence a due proportion of taxes may arise upon each town. If this was to be done by a solemn and formal act of legislation, it would become indispensably necessary, in every alteration in subsequent taxes, to have a solemn and formal repeal of it, unless, when a succeeding tax act should differ, it might be deemed a repeal of that part of the valuation with which it militated; and this would render the valuation an act of very changeable and fickle existence; and so fluctuating is property, that, unless taxes follow each other in a very rapid succession, there must be many alterations in each.

The settlement of a valuation cannot be an act of legislation, because nobody is bound by it. It relates to nobody but the two Houses, who can recede from it severally when they please. A Legislature cannot make laws to bind itself as such, and a valuation before a tax act is passed cannot lay an obligation upon any person whomsoever. And hence it appears that a valuation, although agreed upon by both Houses, cannot be anything more than a mode of conduct, to which they have both assented; and cannot be the originating of a money bill, because the moment a bill is originated it must begin to exist, and a valuation may exist forever without a tax act. And therefore, as it is no act of legislation, I can find no necessity, arising from the Constitution, of its being the act of both Houses as a Legislature.

But nevertheless, as no bill for taxing the people can be passed without the concurrence of the Senate, and as the Constitution hath made it their duty as one branch of the Legislature to see that the assessments of taxes are proportionate and reasonable, they ought, before they act, to have such evidence laid before them as will induce a belief that the tax originated by the House is proportionable upon the towns according to their share of property; which evidence cannot be had in the Senate consistently with the claim of the House. For if the House is "finally to settle and conclude upon the proportion," and solely to possess the documents and evidence returned in pursuance of an act of the whole Legislature, the Senate must act without due light and information, and thereby be rendered dependent upon the House.

The Constitution provides fully, as I apprehend, against this inconvenience, for the Senate may propose an amendment in a

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money bill; which power cannot be confined to the form of the act alone, but must be extended to every part of the bill. And they must be supposed to act understandingly, and their understanding, if they act as an independent body, must arise from the returned lists of property, and not from the arrangement or opinion of the House upon those lists.

I am therefore of opinion that the determination of what property shall be liable to taxation, and the settlement of the mode of obtaining evidence of what quantity of such property each town is possessed, are acts of legislation, and must be done by both Houses; and that, when such evidence is lodged in the Secretary's office, it is, by force of the Constitution, as other documents and papers are, subject to the control of both Houses, and either may order the Secretary to lay them upon their table. But as the arrangement of them into what is called a valuation, in order to determine the proportion of tax to be assessed upon each town, is merely a mode of acquiring light from and rectifying mistakes in the evidence, I can see no necessity, arising from any part of the Constitution, of its being an act of both Houses as a Legislature, but they may, from the documents, make separate rules of proportion for themselves respectively, although it might be more convenient to do it jointly.

JAMES SULLIVAN.*

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* In March 1781, the following report was made to the House of Representatives, concurred in by both Houses and approved by the Governor:

"The committee of both Houses appointed to consider the Opinions of the Justices of the Supreme Judicial Court, upon the question between the two Houses relating to the taking of the valuation, and inquire into and report the principles on which the valuation shall be taken, report as their opinion, that there be a committee of both Houses appointed to examine the returns of the several towns in this State respecting their taxable property and state a valuation thereon, and report the proportion that the several towns and plantations in this Commonwealth shall pay toward the public taxes, — to consist of five members from the Senate with such numbers from the House as the House shall think proper to add thereto."

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Opinion of the Justices to the Senate and House of Representatives.

The question whether a bill or resolve appropriating money from the Treasury of the Commonwealth is a money bill, which must, by the Constitution, c. 1, sect. 3, art. 7, originate in the House of Representatives, is a question upon which the two branches of the Legislature are authorized by the Constitution, c. 3, art. 2, to require the opinion of the Justices of the Supreme Judicial Court.

The exclusive privilege of the House of Representatives, under the Constitution of the Commonwealth, c. 1, sect. 3, art. 7, to originate money bills, is limited to bills that transfer money or property from the people to the State, and does not include bills that appropriate money from the Treasury of the Commonwealth to particular uses of the government, or bestow it upon individuals or corporations.

To the Honorable the Senate of the Commonwealth of Massachusetts:[1]

On the nineteenth day of April last the Honorable Senate adopted an order, which was transmitted on the next day to the Justices of the Supreme Judicial Court, requesting their opinion upon the following questions:

"First. Can the Senate, under the provisions of chapter 1, section 3, article 7, of the Constitution, originate a bill or resolve appropriating money from the Treasury of the Commonwealth?

"Second. Can the Senate, under said provisions, originate a bill or resolve, in any way involving, directly or indirectly, the expenditure of money from the Treasury, or imposing any burden or charge thereon?"

On the twenty-second day of April the Honorable House of Representatives adopted an order, which was on the next day transmitted to the Justices of the Supreme Judicial Court, requiring their opinion upon this question:

"Is the power to originate a bill appropriating money from the State Treasury limited by the Constitution to the House of Representatives, or does it reside in both branches of the Legislature?"

On the third day of May the Justices of the Supreme Judicial Court, having taken these questions into consideration, addressed a communication to the Honorable Senate, and a like communi-

[1] A duplicate of this opinion was addressed to the Honorable the House of Representatives.

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cation to the Honorable House of Representatives, respectfully asking to be furnished with copies of any pending bills or resolves, upon which the questions propounded by that House to which the communication was addressed had arisen, as well as with any precedents from the journals or documents of the General Court, before or since the adoption of the Constitution of the Commonwealth, which that House might be pleased to communicate; and informing each House of the communication so made by the Justices to the other House.

In answer to these communications, the Justices received from the presiding officers of the two Houses copies of a resolve and of a bill.

By the resolve, after reciting that Thomas Cahill, formerly of Boston, had been arrested in Ireland, at the instance of officers acting in behalf of this Commonwealth, on the charge of having committed a murder here, and had been by them brought to this Commonwealth, and imprisoned for a long time, and then released without trial, and thereby had suffered greatly in body and mind, and had been put to large expense, and obliged to return to Ireland without any decision by the courts as to his guilt or innocence, it was "Resolved, that the sum of one thousand dollars be paid to Thomas Cahill, and the same is hereby appropriated; said sum to be placed in the hands and at the disposal of the Governor, to be by him paid to said Cahill in such manner as in his judgment will best secure to said Cahill the full benefit of the money."

The bill purports to enact that "there is hereby appropriated, to be paid from the ordinary revenue, unless otherwise ordered, a sum not exceeding thirteen thousand two hundred and seventy-seven dollars, in addition to the amount heretofore appropriated, for the support of the State Reform School for Boys at Westborough."

The Justices were informed that both the resolve and the bill originated and were passed in the Senate; that the House of Representatives refused to entertain them, on the ground that each was a money bill, within the provision of chapter 1, section 8, article 7, of the Constitution of the Commonwealth, and therefore could not originate in the Senate; and new ones in the same words were introduced in the House.

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The Justices have received from the President of the Senate his opinion upon the question, printed by order of the Senate,[1] and referring to the opinion delivered by the Honorable Robert C. Pitman (now one of the Justices of the Superior Court) as President of the Senate in 1869,[2] and from the Speaker of the House of Representatives his opinion upon the same question,[3] referring to the opinions delivered by his predecessor, the Honorable Harvey Jewell, in 1868 and 1869.[4]

The Senate appointed a special committee on the communication from the Justices (consisting of the President of the Senate and two other senators) with instructions to search for precedents; and the House of Representatives appointed a like committee (consisting of the Speaker and the chairmen of the standing committees on Finance and on the Judiciary) to confer with the Senate, or any committee thereof, upon the communication from the Justices. Upon the report and recommendation of these committees, the two Houses, on the tenth day of May, passed the following order:

"Ordered, That the opinions of the four Justices of the Supreme Judicial Court, delivered in the Senate February 22, 1781, and now in the archives of the Commonwealth, with the lists of bills levying taxes, and bills and resolves appropriating money, which originated in the Senate between 1780 and 1790, together with the precedents extracted from the records of the General Court prior to 1780 — which lists and precedents have been collected under the direction of the Senate committee, to which a communication of the Honorable Justices of the Supreme Judicial Court was referred — be printed, and that copies thereof be transmitted to the Justices."

Copies of the report of each committee,[5] and of this order, with the opinions, lists, and precedents therein mentioned,[6] have accordingly been transmitted to the Justices.

These papers having been received by the Justices only three days before the final prorogation of the Legislature, and while

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[1] Senate Doc. 1878, No. 235. [2] Senate Doc. 1869, No. 275.
[3] House Doc. 1878, No. 310.
[4] House Doc. 1868, No. 250. House Journal, 1869, p. 630.
[5] Senate Doc. 1878, No. 252. House Doc. 1878, No. 356.
[6] Senate Doc. 1878, No. 253.

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they were holding terms of court in various counties, it was impracticable for them to consult together and submit opinions to the two Houses at the same session. Under these circumstances, the Justices have felt, that before transmitting their opinions, in accordance with what they understand to have been the expectation of both Houses, and with the usage in similar cases,[1] to the President of the Senate and the Speaker of the House of Representatives during the recess of the Legislature, a due sense of the honor conferred upon them by requiring their opinions upon a matter of this nature, on which there has been frequent difference of opinion between the two Houses for ten years past, demanded of the Justices a thorough investigation of the subject, and a somewhat extended statement of the grounds of their conclusion.

The Justices of the Supreme Judicial Court, having now fully considered the questions upon which their opinions have been required by the Honorable Senate and the Honorable House of Representatives respectively, and the precedents communicated to them by the joint order of the two Houses, and other precedents and authorities on the subject, respectfully submit the following opinion:

The Constitution of the Commonwealth provides as follows: "All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."[2]

The questions proposed by the two Houses, although differing in form, appear to us to present substantially one and the same question; namely, whether a bill which appropriates money from the treasury of the Commonwealth, and does not provide for levying such money upon the people, by tax or otherwise, is a money bill, which must, by this provision of the Constitution, originate in the House of Representatives.

Upon first taking up this question, some of us had doubts whether it was one upon which we could properly express an opinion. Although a consideration of the precedents dispelled those doubts, it has seemed to us proper, in order to show that in undertaking to define the constitutional authority of a branch of the Legislature, we have been cautious not to exceed our own,

[1] 9 Cush. 605.

[2] Chap. 1, sect 3, art. 7.

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that we should state the reasons on which it has appeared to us to be our duty to answer the question to the best of our information and abilities.

The question is indeed, in one aspect, a question of parliamentary privilege and of parliamentary procedure; but it is also a question of the construction of the Constitution of the Commonwealth, which is on this subject the supreme law.

The Constitution declares that "each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions."[1] This article, as reported in the Convention that framed the Constitution, limited the authority to the Governor and Council and the Senate, and was extended by the Convention so as to include the House of Representatives;[2] and, as may be inferred from the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the King, as well as the House of Lords, whether acting in their judicial or in their legislative capacity, had the right to demand the opinions of the twelve judges of England.

The practice of the Stuart kings, in taking extrajudicial opinions of the judges upon questions about to come before them judicially, was an unconstitutional abuse of the royal authority in this respect.[3] But, since the Revolution of 1688, so sturdy an asserter of the independence of the judges as Lord Holt joined with the other judges of the time in opinions to King William III. upon the extent of the power of pardon,[4] and to Queen Anne upon the question whether a writ of error should be granted as of right;[5] and, as late as 1760, Lord Mansfield, Chief Justice Willes, and other judges, gave an opinion to King George II. upon the jurisdiction of a court martial to try an officer, after his dismissal from the army, for a military offence committed while

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[1] Chap. 3, art 2.

[2] Journal of Convention of 1779–80 (ed. 1832) 211, 242.

[3] *Stafford's case*, Year-Book 1 H. VII. fol. 26, pl. 1. Lord Coke, in *Peacham's case*, 2 Howell's State Trials, 871. 3 Inst. 29. Foster's Crown Law, 200. Co. Lit. 110, Hargrave's note.

[4] *Fenwick's case*, Fortescue, 385.

[5] *Paty's case*, 14 East, 92, note; 14 Howell's State Trials, 861, note.

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in actual service.[1] So, under the Constitution of the Common wealth, opinions have been given by the Justices of the Supreme Judicial Court to the Governor and Council upon questions of the exercise of the power of pardon,[2] the issue of death-warrants,[3] the validity of the proceedings of a court martial,[4] and the authority of the Governor, as commander-in-chief, over the militia.[5]

We are not aware of any instance since 1760 in which the Crown has exercised the power of asking the opinion of the judges. But the right of the House of Lords to put abstract questions of law to the judges, the answer to which might be necessary to the House in its legislative capacity, has been often acted on in modern times.[6]

There are expressions in Lord Coke's writings to the effect that the judges ought not to give opinions upon any law, custom or privilege of Parliament.[7] But it is to be observed, that, in that passage in which he is particularly treating of their duties when summoned to act as assistants to the House of Lords in matters of law, he qualifies the statement by the words, "as hath been said;"[8] clearly signifying that he was not so much stating his own opinion, as referring, according to his habit, to the cases which appeared to support the position.[9]

The precedents referred to by Lord Coke, and which are the foundation of the theory that the judges cannot properly give an opinion upon any question of the law, privilege or custom of Parliament, are two cases in the rolls of Parliament in the reign of Henry VI. In the one case, a question of precedency between two earls in the Parliament, the King's Council, and elsewhere, was referred by the King, by the advice of the House of Lords, to the judges, who, while observing that it was a matter of Parliament belonging to the King and to the House of Lords to determine, declared in positive terms their own opinion upon the

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[1] *Lord George Sackville's case*, 2 Eden, 371.

[2] 13 Gray, 618.

[3] 11 Cush. 604.

[4] 3 Cush. 586.

[5] 1 Allen, 197, note.

[6] *M'Naghten's case* (1843) 10 Cl. & Fin. 200, 212–214.

[7] 4 Inst. 15, 50. 13 Rep. 63.

[8] 4 Inst. 50.

[9] O. Bridgm. 329, Hargrave's note. Coke's Answer to King James I. about *Bonham's case*, 6 Bacon's Works (ed. 1803) 405, 407. Prynne's Fourth Register, 648.

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question submitted; and the case was decided by the King and Lords according to that opinion.[1] In the other case, Thomas Thorp, the Speaker of the House of Commons, having been taken in execution on a judgment recovered against him by the Duke of York in a court of law. the Commons petitioned the King and the House of Lords for his discharge; and the House of Lords asked the opinion of the judges upon the question, "whether the said Thomas ought to be delivered from prison by force and virtue of the privilege of Parliament or no." The judges, after consultation, answered "that they ought not to answer to that question, for it hath not been used aforetime that the justices should in any wise determine the privilege of this High Court of Parliament; for it is so high and so mighty in his nature that it may make law, and that that is law it may make no law; and the determination and knowledge of that privilege belongeth to the Lords of the Parliament, and not to the justices." Yet the judges went on to declare the effect allowed to such privilege of Parliament in the courts of law, and the reasons therefor.[2] It thus appears, that, in each of those cases, the judges, while recognizing that the final determination of the question belonged to the House of Lords, did give an opinion to assist the House in such determination.

It is worthy of remark, that only two years later, in Pylkington's case,[3] cited by Mr. Speaker Jewell, the same judges, when the validity of a particular act of Parliament was brought before them judicially, sent for the Master of the Rolls and the Clerk of the Parliament to inform them of the course of proceeding in passing bills; and that the statement, made by those officers, of the forms observed when a tax granted by the Commons was increased or diminished by the Lords, clearly shows, that, in that age, the Lords were accustomed to amend tax bills. In the reign of Elizabeth, the House of Lords, upon a bill touching the lands of a person attainted by a former act of Parliament, required the judges to consider the question, whether, by the records of Parliament, the act of attainder appeared to have been passed in the twenty-eighth or in the twenty-ninth year of

[1] *Earl of Arundel's case*, Rot. Parl. 27 H. VI. No. 18.

[2] *Thorp's case*, Rot. Parl. 31 & 32 H. VI. Nos. 25, 26, 27.

[3] Year-Book 33 H. VI. fol. 17, pl. 8.

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the reign, "and to declare their opinions concerning it; where upon they saw and considered writs of summons of the Parliament, and divers patents concerning the matter," and gave an opinion, which the House acted on.[1] And in the reign of Charles II. Lord Hale and his associates, sitting in the King's Bench, took judicial notice of the order of proceedings of the Houses of Parliament and their committees.[2]

In the reigns of Henry VIII.,[3] of Philip and Mary,[4] and of James I.,[5] the judges freely gave opinions, when required by the House of Lords, upon questions of the privilege of members of Parliament from arrest; and in the first year of Queen Elizabeth, the opinion of the judges was taken by the House of Lords upon such a purely parliamentary question as the manner of exercising the right of voting by proxy.[6]

One other English precedent is worthy of being more fully stated. By an act of Parliament passed in 1624, granting an aid to King James I. for the maintenance of the then expected war with Spain, it was provided, in order to secure the application of the moneys so granted to the uses mentioned in the act, that the sums levied should be paid into the hands of eight citizens of London named as treasurers, and expended only upon the warrant of ten other persons, four peers and six commoners, named as the King's council for the war, or of five or more of them; and that both treasurers and councillors should make oath for the performance of their trust, and be accountable to the House of Commons. The bill having been brought up from the Commons, the House of Lords, before passing it, ordered all the judges to attend and deliver their opinions upon some questions of the jurisdiction and authority of the two Houses respectively, or, in the phrase of that time, "some points of judicature in the said bill." The judges attended accordingly, and delivered an opinion as follows: "Resolved by all, with one uniform assent, that, upon perusal of the several parts of the act of sub-

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[1] 1 Anderson, 294, pl. 303.

[2] *Lake* v. *King*, 1 Saund. 131, 133.

[3] *Ferrer's case*, 1 Hatsell's Precedents (3d ed.) 54.

[4] *Pledall's case*, 1 Commons' Journals, 46; Prynne's Fourth Register, 1213, 1214; 1 Hatsell, 74.

[5] 3 Lords' Journals, 155, 157. 1 Hatsell, 177, note.

[6] 4 Inst. 13.

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sidy, they do not conceive that there is anything therein which may impeach or blemish the privilege or power of the Higher House, or add to the privileges of the Lower House, in anything, save in the particular case in question, and in no other case of the like or other nature; and that for these reasons: First, Because the judicature in this particular case is not assumed by way of privilege, to beget a precedent, but by way of act, which taketh effect, not only by themselves, but by the Lords and by the royal assent of the King; Secondly, Because the ground of this act proceeded originally from the gracious proposition of his Majesty himself, and that proposition is mentioned in the act itself; so as there is no ground to do the like hereafter, to be drawn from this act, unless it be upon the like proposition from the King, with consent of the Lords, who must fully assent unto this act." The principal judges at that time were Chief Justice Ley, Chief Justice Hobart, and Chief Baron Tanfield, all of great learning, integrity, and independence.[1] The Lords ordered the opinion to be signed by all the judges, and entered of record, and thereupon passed the bill, first, however, adopting and recording a protest, reciting "forasmuch as this act of subsidy is in many things different from the ancient usual form of a subsidy bill; and for that something in the said act contained may in time to come be construed, either to lessen the jurisdiction of the one House, or to add to the jurisdiction of the other, more than hath been used or heretofore admitted;" and therefore declaring that nothing in this act should thereafter be taken or construed to give or take any jurisdiction, power, privilege, or authority, to or from either House of Parliament, but that each should severally and dividedly hold, use, and enjoy the same liberties, privileges, powers, and jurisdictions as theretofore.[2]

In this Commonwealth, the privileges of the two Houses do not, as in England, rest merely upon legislative resolves or usages; but they are defined by the written Constitution.[3] The same Constitution which defines these privileges declares

[1] 6 Foss's Judges of England, 166, 330, 366.

[2] St. 21 Jac. I. c. 33; 4 Sts. of the Realm, pt. ii. 1247. 3 Lords' Journals, 406, 408.

[3] *Burnham's case*, 14 Gray, 226, 238. *Whitcomb's case*, 120 Mass. 118, 122.

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that each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions. The opinions of the Justices can be required only "upon important questions of law," not upon questions of fact;[1] "and upon solemn occasions," that is to say, when such questions of law are necessary to be determined by the body making the inquiry, in the exercise of the legislative or executive power entrusted to it by the Constitution and laws of the Commonwealth.[2] No other limit of the authority to require the opinions of the Justices is expressed in the Constitution. In giving such opinions, the Justices do not act as a court, but as the constitutional advisers of the other departments of the government, and it has never been considered essential that the questions proposed should be such as might come before them in their judicial capacity.

For instance, opinions have been frequently required by the House of Representatives, and given by the Justices, upon questions of law concerning the election and qualifications of members, of which the House is made by the Constitution the final judge;[3] and, as appears in the collection of precedents transmitted to us by order of the two Houses, the Justices of the Supreme Judicial Court in 1781, in obedience to a joint order of the first Legislature that sat under the Constitution, delivered opinions upon the question, whether, notwithstanding the provision of the Constitution, that all money bills shall originate in the House of Representatives, "the Senate have an equal right and concern with the House of Representatives in originating and completing the settlement of a valuation."[4]

The interesting character of the precedents to which we have referred, and the want of any published collection in which they may be readily found, may, we trust, excuse the fulness with which we have stated the considerations which have satisfied us

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[1] *Opinion of Justices*, 120 Mass. 600.

[2] *Answer of Justices*, 122 Mass. 600.

[3] Const. Mass. chap. 1, sect. 3, art 10. 3 Pick. 517. 11 Pick. 538. 18 Pick. 575. 23 Pick. 547. 1 Met. 580. 5 Met. 587, 591. 10 Gray, 613. 122 Mass. 594.

[4] *Opinions of Justices, ante*, 547.

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that the orders of the Senate and of the House of Representatives present an important question of law, arising upon a solemn occasion, and upon which the two Houses are empowered by the Constitution to require our opinion. Any embarrassment that we might have felt in giving an opinion to one House upon a question affecting the constitutional powers of both has been removed by the facts that each House has proposed a similar question and that the two Houses have joined in an order transmitting to us all the precedents that either House deemed of sufficient importance to be considered.

The prominence given to the practice of the Lords and Commons in England, in the opinions heretofore delivered by the presiding officers of each branch of the Legislature of Massachusetts upon the question of the right of the Senate to originate bills or resolves appropriating money from the Treasury of the Commonwealth, makes it proper to give an outline of the history of the usage of the English Parliament before 1780 in regard to bills raising, granting, and appropriating money, having particular regard to the precedents cited in those opinions.

It was well established in England, before the emigration of our ancestors, that all grants in Parliament of subsidies to the King must begin in the House of Commons, and be first granted by them.[1] In 1628, within a year before the Massachusetts Colony Charter was granted, the preamble of an act for a grant of subsidies was framed by a committee of the Commons, which included Coke, Glanville, Selden, and other eminent lawyers, and, after conference with the Lords, was finally fixed in the form of a gift to the King from "Your Majesty's most humble and loyal subjects the Commons in your High Court of Parliament now assembled;" and the bill, after being passed by the House of Lords, was presented by the Speaker of the House of Commons to the King for his approval.[2] In 1640 a vote of the Lords, that the matter of supply should have precedence, having been sent to the Commons with a request for a conference, was resolved

[1] The Indemnity of the Lords and Commons, Rot. Parl. 9 H. IV. No. 21. 8 Hatsell (2d ed.) 138. 4 Inst. 29. Dyer, 43 b. 3 Hallam's Const. Hist. (7th ed.) 27–29.

[2] 1 Commons' Journals, 910, 914, 915, 919. 3 Lords' Journals, 858, 860, 879. St. 3 Car. I. c. 8; 5 Sts. of the Realm, 39.

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by the Commons to be a breach of privilege, although the Lords at the conference declared that they "would not meddle with matter of subsidy, which belongs properly and naturally to you; no, not to give you advice therein, but have utterly declined it;" and Lord Clarendon says: "This conference was no sooner reported in the House of Commons than their whole temper seemed to be shaken. It was the undoubted fundamental privilege of the Commons in Parliament that all supplies should have rise and beginning from them."[1] Upon the Restoration of the Monarchy in 1660, the first clause in a bill for continuing customs and excises was amended so as to stand thus: "The Commons assembled in Parliament give and grant" unto the King the subsidies mentioned in the bill; and a member was appointed "to carry this bill to the Lords, and to desire the Lords, that, it being a bill concerning money, it be sent back to this House when the Lords have passed it." The Lords passed the bill in this form, and returned it to the Commons, who presented it by their Speaker to the King.[2] The proceedings in England upon all bills of supply have since conformed to this precedent.

The right of the Lords to reject bills of supply and taxation was admitted; and their right to amend such bills does not appear to have been denied by the Commons before 1671.[3] In that year, on a bill for an imposition on foreign commodities, the House of Commons unanimously resolved, "that, in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords," and asserted "that there is a fundamental right in that House alone, in bills of rates and impositions on merchandise, as to the matter, the measure and the time." The Lords, on the other hand, resolved with equal unanimity that the power exercised by them in making amendments and abatements, "as to the matter, measure and time, concerning the rates and impositions on merchandise, is the fundamental, inherent and undoubted right of the House of

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[1] 2 Commons' Journals, 13. 3 Hatsell, 102, & note. 1 Clarendon's Hist. (ed. 1849) 190.

[2] 8 Commons' Journals, 98, 102. 11 Lords' Journals, 105, 109. St. 12 Car. II. c. 4; 5 Sts. of the Realm, 181.

[3] 3 Hatsell, 136. Hale on Parliaments, 65, 66. Report of Select Committee on Tax Bills, 1860, appendix, pp. 7, 12, 13. 3 Hallam, 30.

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Peers, from which they cannot depart."[1] In 1678, on a supply bill being amended by the Lords, the House of Commons carried their doctrine still farther, and passed a resolution, "that all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit and appoint, in such bills, the ends, purposes, considerations, conditions, limitations and qualifications of such grants; which ought not to be changed or altered by the House of Lords."[2] On both those occasions, the controversy between the two Houses was terminated by a prorogation of Parliament.[3] But the resolution of 1678 has been often re-affirmed by the Commons, and made the foundation of their claim of privilege in matters of supply; and the Lords, though they have never expressly disclaimed the right to amend bills of supply, have never since practically asserted it when controverted by the Commons.[4]

The Commons, up to that time, had not undertaken to extend their exclusive privilege to the imposing or distribution of penalties.[5] But in many instances from 1690 to 1696, and again in 1702, the Commons denied, and the Lords maintained, the right of the latter to insert clauses inflicting or altering the application of pecuniary penalties.[6] In 1696 the reason assigned by the Commons is, that "their Lordships have added and imposed pecuniary penalties upon the subject; whereas all charges of money upon the people ought to begin with the Commons;" and the Lords, on the other hand, "conceive that the imposing of pecuniary penalties of this nature is no charging of money upon the people; because nothing can truly be called so, which is within the people's choice not to pay, if they please; as they need not to do in this case, unless they will wilfully break the law, which is made for the welfare of the State, and not for tax-

[1] 9 Commons' Journals, 235, 239. 3 Hatsell, 110, 368, 370, 371.

[2] 9 Commons' Journals, 509. 3 Hatsell, 112, 137, 407.

[3] 9 Commons' Journals, 244, 515.

[4] 3 Hallam, 82. 1 May's Const. Hist. (Am. ed.) 444. May's Law of Parliament (7th ed.) 575.

[5] 3 Hatsell, 112, 113.

[6] 3 Hatsell, 114–117, 120, 130.

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ing of the subject."[1] In some instances, the Commons also asserted their exclusive privilege in cases of amendments authorizing the taking of fees, as "laying a charge upon the subject."[2] And the Commons afterwards applied the same rule to both penalties and fees, until it was found so inconvenient in practice, that it was relaxed in the present century by standing orders of the House.[3]

In the resolutions and proceedings of the two Houses of Parliament, the words "granting money" were applied to grants from the people through the Commons to the King; and such was the common meaning of the words in England. For instance, the elder Pitt (afterwards Lord Chatham), in the debate in the Commons in 1766, on the right of Parliament to tax the Colonies, said: "The taxes are a voluntary gift and grant of the Commons alone." "When, therefore, in this House we give and grant, we give and grant what is our own. But in an American tax what do we do? We, your Majesty's Commons of Great Britain, give and grant to your Majesty — what? Our own property? No. We give and grant to your Majesty the property of your Majesty's Commons of America."[4] So Mr. Burke, in his speech on Conciliation with America in 1775, spoke of the right to tax as "this privilege of granting money."[5]

The right asserted by the House of Commons, in the resolution of 1678, is that of granting aids and supplies to the King, and of originating bills for such grants, and of specifying in such bills the objects to which, and the modes in which, the money granted by those bills shall be applied. But nothing is there said as to the right of the Lords, when money has been once granted by the Commons without specific appropriation, to originate or to amend a bill appropriating it to particular uses or purposes. As observed by Mr. Hargrave in a paper prepared in 1784 "Concerning the Appropriation of Parliamentary Aids and Supplies for Particular Services," "In the more ancient times the usual course of Parliament on granting taxes and aids to the Crown

[1] 11 Commons' Journals, 728, 739. 3 Hatsell, 117.

[2] 3 Hatsell, 115, & note (1692); 124, note (1742).

[3] May's Law of Parliament, 579, 580. Report of Select Committee on Tax Bills, 1860, pp. xii, xiii; appendix, p. 87.

[4] 16 Parl. Hist. 99. [5] 2 Burke's Works (Am. ed. 1839) 33.

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was to leave the application of the money wholly to the discretion of the King and his ministers; for though the occasion of the grant, as for enabling the King to defend the sea, or to carry on some war, was frequently mentioned, yet there was nothing like an appropriation of the tax to any particular purpose, the act granting the supply being usually silent as to the manner of expending it." In early times there were few exceptions to this practice. In the instance in the reign of James I., already mentioned, the restriction was inserted in accordance with a suggestion of the King. The despotic tendencies of Charles I. and the licentious extravagance of Charles II. induced the Commons to insert clauses of appropriation in some of the supply bills passed during their reigns. After the Revolution of 1688, the grant of supplies with appropriation to certain services became the common practice, and from 1698 it has been usual to pass a general appropriation act at each session of Parliament.[1]

By standing orders of the House of Commons, passed early in the last century, and by the construction given to those orders by the House, the supplies could only be granted upon recommendation from the Crown; and all sums so granted, whether for the use of the government or for private purposes, were considered as grants from the people to the Crown. The usual form of proceeding was, that the amount and the general purposes of the grant were fixed by the committee of supply, and the manner of raising it was determined by the committee of ways and means; and, when these two committees were closed, the House passed a general appropriation act.[2] Bills for appropriating out of the Treasury money already therein were, therefore, comparatively rare; and the copious collections of precedents in Mr. Hatsell's work, and in the Report of the Select Committee of the Commons on Tax Bills in 1860, contain few cases before the American Revolution, in which special appropriation bills, originating or amended in the House of Lords, were objected to by the House of Commons as infringing upon their privileges. The principal ones are as follows:

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[1] 1 Hargrave's Juridical Arguments, 394–402. 3 Hatsell, 175–181. 2 Hallam, 356–358. 3 Hallam, 115–117.

[2] 3 Hatsell, 173–178.

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In 1691, at a conference between the two Houses of Parliament upon a bill for appointing commissioners to state the public accounts, the Commons resolve that the "disposition as well as granting money by act of Parliament hath ever been in the House of Commons." But the House of Lords "cannot allow the disposition, as well as granting, of money by act of Parliament, to have been solely in the House of Commons." And the bill was lost by disagreement between the two Houses.[1] A like controversy, with like result, took place in 1702.[2]

In 1696 amendments of the Lords to a bill of the Commons for remedying the ill state of the coin were rejected by the Commons, because the amendments, "being in order to give a longer time to receivers and collectors of the taxes and revenues to pay into his Majesty's Exchequer such hammered money as is mentioned in the bill, by tale, will give an opportunity to the said receivers and collectors to make great advantages to themselves, without any ease to the people, and will increase the deficiencies which are to be supplied at the public charge; for which reason alone, the Commons can by no means admit that the Lords could make any amendment to this bill, which is to be a charge upon the people as aforesaid." And the Lords did not insist on their amendments.[3]

In the same year the Commons sent a message to the Lords to put them in mind that a bill for encouraging the bringing in of wrought plate to be coined belonged to the House of Commons, to be presented by their Speaker to the King, and to desire that it might be sent down to them, "for that the same allowed 5*s.* 4*d.* per ounce to be given for plate to be brought into the mints to be coined; and authorized the Commissioners of the Treasury to take £50,000 out of any moneys lent or advanced into the Exchequer, for the paying for such plate." But "the bill being brought by the clerk of the House of Lords to the clerk of this House, as bills relating to money usually are, the message was not sent."[4]

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[1] 10 Commons' Journals, 646, 654, 669. 3 Hatsell, 115, 435, 438, 451

[2] 13 Commons' Journals, 899, 903. 3 Hatsell, 119.

[3] 11 Commons' Journals, 606, 607. 3 Hatsell, 116.

[4] 11 Commons' Journals, 732. 3 Hatsell, 144.

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In 1708 the Commons disagreed to an amendment made by the Lords to a bill for covering the cupola of St. Paul's Church in London with copper, which the Lords proposed should be covered with lead. In the reasons given, the Commons, after arguing at some length the practical superiority of copper over lead, added, "The Commons cannot but take notice that the money for building the said cathedral was granted by the Commons, and therefore the application thereof does belong to them." The bill was lost by prorogation of Parliament.[1]

In 1719 an amendment by the Lords of a bill to prevent smuggling was disagreed to by the Commons as being "a disposition of public money," and another as being "an alteration of the Commons' disposition of public money," "contrary to the undoubted right of the Commons, and from which they can never depart." After a conference, the Lords did not insist on their amendments, the precise nature of which does not appear.[2]

In 1733 a bill from the Lords, for vesting in Sir Theodore Janssen the remainder of an estate "now in the Crown," was unanimously rejected by the Commons; but no reasons are stated.[3]

In 1736 the Lords amended a bill for indemnifying persons guilty of offences against the laws made for securing the revenues of customs and excise. Upon the amendment being read in the Commons, Mr. Speaker Onslow submitted to the House the question whether this was not an encroachment upon their privileges, and observed, "that, in all bills by which any tax or duty was to be imposed upon the subject, it was the undoubted privilege of that House, and they had always insisted upon it, that the other House should not make any the least amendment to any such bill, but were in all such cases either to pass the bill without any amendment, or to reject it if they thought fit; that, as the taxes and duties granted by that House could not be raised or collected without prescribing proper and effectual methods for that purpose, therefore in all bills for imposing any tax or duty upon the subject, certain methods had been prescribed for effectually raising that tax or duty; and if the methods prescribed

[1] 15 Commons' Journals, 649. 3 Hatsell, 122.

[2] 19 Commons' Journals, 142–144. 3 Hatsell, 122.

[3] 22 Commons' Journals, 138. 3 Hatsell, 124.

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should afterwards by experience be found ineffectual, new methods had always been contrived, and proper bills passed for establishing those new methods; which last sort of bills had generally been looked on as appendixes to the first bill by which the tax or duty was granted; therefore such bills were looked upon as bills of the same nature with the first, and consequently that House had generally insisted upon it, that the other House could not make any amendment to this last sort of bills, no more than they could have done to the bill by which the tax or duty was granted." But the House, upon examination of precedents, agreed to the amendment.[1]

Mr. Hatsell, who wrote at the close of the American Revolution, and whose work has ever since been considered a standard authority for the claims of the Commons up to that time, in his chapter upon "Proceedings between Lords and Commons where the Rights and Privileges of either House are concerned," says: "Each House has a right to originate and to pass such bills as to them may seem proper, except that the Lords have, as appears from several of the instances, claimed the exclusive right that bills for restitution of honors, or in blood, should commence with them; and the House of Commons have on their part asserted, and I believe invariably preserved, the exclusive exercise of the right, 'that bills of supply, imposing burthens upon the people, should be the grant of the Commons, and that the Lords should have no other voice than, as one branch of the Legislature, by their assent to give the authority of a law to the levying of those aids and taxes which the Commons shall think wise and fitting to impose.' Other bills of what kind soever, whether relating to the Parliament itself, or to either House separately, may have their commencement indifferently in either House," with the single exception of a bill for a general pardon, which begins neither with the Lords nor with the Commons, but with the Crown.[2]

He here distinctly states that the only bills which must originate in the House of Commons are "bills of supply imposing burthens upon the people." So when he comes to deal more

[1] 3 Hatsell, 125. 9 Chandler's Debates, 236*. 9 Parl. Hist. 1268. 22 Commons' Journals, 717.

[2] 3 Hatsell, 62, 63.

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particularly with what the House of Commons "have always considered as their exclusive right, viz. the grant of aids and taxes to the Crown for the public service," he speaks of it as applying to bills, "which either in the form of positive taxes or pecuniary penalties, or in any other shape, might by construction be considered as imposing burthens upon the people;"[1] and afterwards says, that, according to his observation, "the following propositions contain very nearly everything which has at any time been claimed by the Commons upon this subject:

"First, That in bills of aid and supply, as the Lords cannot begin them, so they cannot make any alterations, either as to the quantum of the rate, or the disposition of it, or, indeed, any amendment whatsoever, except in correcting verbal or literal mistakes; and even these the House of Commons direct to be entered specially in their journals, that the nature of the amendments may appear, and that no argument prejudicial to their privileges may be hereafter drawn from their having agreed to such amendments.

"Secondly, That in bills which are not for the special grant of supply, but which, however, impose pecuniary burthens upon the people, such as bills for turnpike roads, for navigations, for paving, for managing the poor, &c., for which purposes tolls and rates must be collected — in these, though the Lords may make amendments, these amendments must not make any alteration in the quantum of the toll or rate, in the disposition or duration of it, or in the persons, commissioners or collectors appointed to manage it. In all the other parts and clauses of these bills, not relative to any of these matters, the Commons have not objected to the Lords making alterations or amendments.

"Thirdly, Where the bill, or the amendments made by the Lords, appear to be of a nature, which, though not immediately, yet in their consequences, will bring a charge upon the people, the Commons have denied the right of the Lords to make such amendments, and the Lords have acquiesced.

"And, lastly, the Commons assert that the Lords have no right to insert in a bill pecuniary penalties or forfeitures, or to alter the application or distribution of the pecuniary penalties or forfeitures which have been inserted by the Commons.

[1] 3 Hatsell. 182.

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"These rules with respect to the passing or amending of bills are clear, distinct, and easy to be understood and applied in all the cases which may occur. It has been sometimes attempted to extend this claim on the part of the Commons still farther; or, rather, so to construe the claim as to tend very much to embarrass the proceedings of the House of Lords upon bills sent from the Commons. This has never appeared to me a prudent measure. I think the House of Commons may rest satisfied with the observance of these rules, which they can maintain upon the ground of ancient practice and admitted precedents. Their sole and exclusive right of beginning all aids and charges upon the people, and not suffering any alterations to be made by the Lords, is sufficiently guarded by the claims as here expressed; and it does not seem to be either for their honor or advantage to push this matter farther, and, by asserting privileges which may be subjects of doubt and discussion, thereby to weaken their claim to those clear and indubitable rights which are vested in them by the Constitution, and have been confirmed to them by the constant and uniform practice of Parliament."[1]

The first and second of these classes include no bills that do not directly impose a pecuniary burden upon the people. The last class, that of bills imposing pecuniary penalties or forfeitures, stands only on the claim of the Commons, that these are burdens upon the people. The third class does not go beyond bills which "in their consequences" will impose a like charge, that is to say, by the effect of the bills themselves; and if construed as including bills which neither directly nor indirectly impose a burden upon the people, further than any bill authorizing the payment of money out of the Treasury may leave less money in the Treasury for the future needs of the government, is inconsistent with Mr. Hatsell's own statement previously quoted, and is supported, as we have seen, by few and inconclusive precedents.

In the debate in the Commons in 1783 on the Lords' amendment to the American Intercourse Bill, the Speaker observed, that, "as the bill empowered the Crown to impose duties, it was, strictly speaking, a money bill, and therefore the House could

[1] 3 Hatsell, 138–140. The references to this volume of Hatsell throughout this opinion are to the second English edition, which is the earliest accessible.

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not, consistently with its own orders, suffer the Lords to make any amendment in it." Mr. Pitt "agreed that the bill was a money bill, and that, having been amended by the Lords, it ought to be rejected;" and Mr. Fox said that "he was willing that the amended bill should be rejected, though he was of opinion that the order of the House respecting money bills was often too strictly construed." [1]

In 1784 the House of Commons passed a resolution, declaring, that for any person in the Treasury or Exchequer, or employed in the payment of the public money, to issue, after a dissolution or prorogation of Parliament, money voted by Parliament for any services, and before the passage of any act of Parliament appropriating the supplies to such services, would be a high crime and misdemeanor, derogatory to the fundamental privileges of Parliament, and subversive of the Constitution of the country. But large supplies were afterwards voted, and not appropriated, before the dissolution of the same Parliament; and the next Parliament, supporting the ministers of the Crown, revoted the same supplies without question, although, in the interval, a portion of them had been expended by the ministers, without any parliamentary appropriation.[2]

Mr. Hallam distinctly says that the Lords have never acknowledged any further privilege in the Commons than that of originating bills of supply.[3] And Sir Erskine May observes, that "in cases where amendments have affected charges upon the people incidentally only, and have not been made with that object, they have been agreed to;" and that, until a very recent period, "the Commons accepted provisions in bills from the Lords, creating charges not directly imposed by the bill, but to be defrayed out of moneys to be provided by Parliament." [4]

The result of the review of this branch of the subject is, that it cannot be considered to have been settled in England before 1780, when the Constitution of the Commonwealth of Massachusetts was adopted, that the appropriation, to particular objects, of moneys in the Treasury or Exchequer of the Sovereign, be-

[1] 23 Parl. Hist. 895. 3 Hatsell, 129.

[2] 39 Commons' Journals, 858. 3 Hatsell, 83, 184. 1 May's Const. Hist. 72–81.

[3] 3 Hallam, 32.

[4] May's Law of Parliament, 576, 578.

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longed exclusively to the House of Commons, and that bills for such appropriation must originate in that House.

The next matter to be considered, and quite as important a one in its bearing upon the true construction of our Constitution, is the comparative powers and privileges of the two branches of the Legislature of the Colony and Province of Massachusetts Bay. In dealing with this, it is to be borne in mind, that, according to the opinions of two of the very greatest constitutional lawyers of England, the House of Representatives in any of the subordinate legislative assemblies of the British dominions was not entitled to the privileges claimed and exercised by the House of Commons in Parliament.

In 1698 a bill for encouraging the linen manufacture in Ireland, having been framed by the Privy Council in England, and transmitted to the Irish Parliament, was there objected to as asserting the King's prerogative, and as invading the privileges of the Irish House of Commons. Lord Somers (then Lord Chancellor of England, and acting as a Lord Justice of the kingdom during the absence of the King in Holland), upon being informed of this by a letter from the Duke of Shrewsbury, Secretary of State, answered as follows: "The bill imposes some pecuniary penalties indeed, which of late the House of Commons in England, in their disputes with the Lords, call a money bill; but surely the Commons in Ireland did never think of carrying their sole right so far. It does also empower the grand juries in the several counties to assess a sum for building workhouses. If that would make it a money bill, there were many money bills passed in England last winter; but there is not anything granted to the King by the bill." [1]

Lord Camden, when Attorney General, gave an opinion upon the several powers of the Council and Assembly of the Province of Maryland, as follows: "As to the power of the Upper House to examine claims and accounts, the Upper House are right in making a stand to this clause in the bill, and should take care how they admit encroachments of this kind, when they are supported by arguments drawn from the exercise of the like rights in the House of Commons here. The constitutions of the two

[1] 2 Hardwicke Papers, 434.

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assemblies differ fundamentally in many respects. Our House of Commons stands upon its own laws, the *lex parliamentaria;* whereas assemblies in the Colonies are regulated by their respective charters, usages, and the common law of England, and will never be allowed to assume those privileges which the House of Commons are entitled to justly here, upon principles that neither can nor must be applied to the assemblies of the Colonies."[1]

At the first settlement of the Massachusetts Colony the Governor and Assistants, chosen annually by the freemen at a General Court under the Colony Charter of 1628,[2] levied taxes, in such proportions as they thought just, upon "the several plantations" for public purposes.[3] In 1632 the leading inhabitants of Watertown, so taxed for fortifying Newtown, objected "that it was not safe to pay moneys after that sort, for fear of bringing themselves and posterity into bondage." But upon being summoned before Governor Winthrop and the Assistants, and "understanding that this government was in the nature of a parliament, and that no assistant could be chosen but by the freemen, who had power likewise to remove the assistants, and put in others," they "were fully satisfied."[4] In 1634 it was enacted "that none but the General Court hath power to raise moneys and taxes;" and the freemen of each town were authorized to choose deputies to the General Court for matters of legislation.[5] The order of 1644, separating the magistrates and deputies into two houses, allowed the magistrates to draw up any "bills and orders which they shall see good in their wisdom," and, having agreed upon them, to present them to the deputies for their assent or dissent;[6] and we are not aware of any question of privilege between the magistrates and the deputies in this regard while the Colony Charter lasted.

By the Province Charter of 1692, "a Great and General Court or Assembly" was established, to consist of the Governor appointed by the Crown, and twenty-eight councillors chosen annually by the General Court, subject to the Governor's nega-

[1] 1 Chalmers Opinions, 263.
[2] 1 Mass. Col. Rec. 12.
[3] 1 Mass. Col. Rec. 77, 82, 89, 93.
[4] 1 Winthrop's Hist. New England, 70.
[5] 1 Mass. Col. Rec. 117, 118.
[6] 2 Mass. Col. Rec. 58.

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tive, and of representatives chosen annually by the inhabitants of each town; and it was declared that the General Court should have full power and authority, among other things, "to impose and levy proportionable and reasonable assessments, rates and taxes, upon the estates and persons of all and every the proprietors and inhabitants of our said Province or territory, to be issued and disposed of by warrant under the hand of the Governor of our said Province for the time being, with the advice and consent of the Council, for our service in the necessary defence and support of our government of our said Province or territory, and the protection and preservation of the inhabitants there, according to such acts as are or shall be in force within our said Province."[1]

In 1694 an unsuccessful attempt was made to secure to the House of Representatives all the rights of the House of Commons. The General Court passed an act declaring "that the House of Representatives of the people of this Province, being a part of the Great and General Court or Assembly, have, by their Majesties' most gracious Charter, undoubted right to all the liberties and privileges of an English assembly;" "and that, when and so often as any motion is made to the House of Representatives for the granting of any money to be levied of the people of this Province, the said House of Representatives ought particularly to be advised what uses and improvement such money is to be raised for;" "and that no public money be or ought to be disposed of by his Excellency the Governor and Council, but for the uses and intents of and according to the acts by which the said money is raised." But this act was disallowed by the King in Council.[2]

The resolve sent up by the House of Representatives with the tax bills in 1703, declaring, "that it is the undoubted privilege of this House that their concurrence be had in the particular application and disposal of all and every sum and sums that are put into the Treasury, so far as it can be practised,"[3] asserts only the necessity of the concurrence of the House, and says nothing of an exclusive right to originate appropriation bills.

[1] 1 Prov. Laws (State ed.) 11, 12, 16, 17.

[2] 1 Prov. Laws, 170, & note.

[3] General Court Records, July 23, 1703.

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The right of the House to originate all acts and orders for raising moneys from the people, and therein to appropriate such moneys to such services as they thought proper, was generally admitted.[1] But the House did not in practice construe this right so largely as the House of Commons in England.

Among the precedents transmitted to us is an order of the Council, concurred by the House, in 1750, directing that certain pieces of silver in the Treasury, being of a baser alloy than dollars, be not paid out by the Treasurer in any payments whatsoever, but be retained in the Treasury for the further order and disposal of the General Court.[2] Resolves for the assessment or collection of local taxes often originated in the Council, and were concurred in by the House without objection.[3] And acts for establishing or continuing the fees of officers appear to have originated and been amended indifferently in either House. In 1765 amendments of the Council to such a bill originating in the House were considered by a committee of conference between the two Houses, and ultimately concurred in with further amendments by the House;[4] and in 1770 a like bill originated in the Council, and was concurred in by the House, "saving to this House their privilege of originating all money bills;"[5] which sufficiently shows that such a bill was not considered a money bill, although it was intended to reserve the privileges of the House as to those that were.

In the early years of the Province, the House of Representatives claimed, as incidental to the right to originate supplies, the right to examine the accounts, before payment of any money under warrant of the Governor and Council; and before 1721 clauses to that effect were inserted in the supply bills. But

[1] 2 Hutchinson's Hist. Mass. (2d ed.) 294. Messages of the House and the Governor, September 18, 19, 1762, and of the House and Council, November 6, 1765, in General Court Records. Mass. State Papers, 1765–75 (ed. 1818) 52–56.

[2] General Court Records, February 14, 1750.

[3] General Court Records, January 12, 23, February 17, 1749; January 16, 22, April 22, June 13, December 31, 1760; January 16, 1761; June 7, November 6, 1764; January 17, 1765; January 9, 1768; June 24, 1771, and April 17, 1772.

[4] General Court Records, February 23, 26, 1765.

[5] General Court Records, November 20, 1770; July 7, 1772.

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this claim was afterwards resisted by the Governor, under instructions from the King, and, after a prolonged controversy, was finally put at rest by order of the King in Council, in accordance with the opinion of the Attorney General (afterwards Lord Hardwicke) and the Solicitor General (afterwards Lord Talbot), as not warranted by the Province Charter; and it is said to have been disapproved by the House of Commons.[1]

In 1730 amendments proposed by the Council, increasing the sum allowed in a bill passed by the House for the support of the Governor, were non-concurred by the House, and the two Houses then held a conference upon the subject, at which the Governor was present; and one of the amendments of the Council was afterwards concurred by the House. Upon which Governor Hutchinson observes, "This was a matter of money, which the House sometimes refuse to confer upon; but they have been unsteady in this respect."[2]

In 1753, the Council having amended a resolution of the House requiring the Province Treasurer to give bond, the House sent up a message, in which they said, "The Honorable Board cannot but know that all grants of money and taxes must originate with the House, and never till lately did the Honorable Board presume to make alteration in any such grants or bills." To which the Council replied: "The right of the House to originate all taxes and grants of money has never been disputed by the Board. But that the House have a right of making certain things necessary to qualify a Province Treasurer, and that the Board are held to agree to all or none of such qualifications, without the liberty of making any amendment to the vote or resolve of the House, is a position, which, until now, has never been laid down by any House of Representatives since the Charter; nor can the Board by any means concede to it." And the Council suggested that the House should prepare a bill more fully and explicitly settling the security to be required of the Treasurer. The House prepared such a bill, which was by the Council "concurred, as taken into a new draft," and then concurred by the House.[3]

[1] 2 Prov. Laws, 574, 701–703. 2 Hutchinson, 378. 4 Palfrey's Hist. New England, 545.

[2] General Court Records, October 1–14, 1730. 2 Hutchinson, 378, & note

[3] General Court Records, June 6–13, 1753.

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On February 20, 1756, a vote of the House of Representatives, that there be allowed and paid the sum of £1,000 to Edmund Trowbridge, Jeremiah Gridley, and James Otis, Esquires, a committee previously appointed by the House to defend actions brought against their Speaker and messenger, and the keeper of the prison, by two persons imprisoned by order of the House for a supposed contempt, was, "In Council, Read and concurred, with amendments. In the House of Representatives, Read and unanimously non-concurred, and the House adhere to their own vote. In Council, Read and non-concurred." On February 21 a message was sent to the Council, in which "the House declare it to be their clear opinion that the grant of any money by this Court, to be raised by the people, must not only originate with the House in consequence of their representing the people, but that such grant cannot, in consequence of this their singular right, be anyways subject to the alteration of any other branch of the government, and that the amendment made yesterday by the Board in the said grant is a violation of the privileges of the House upon a vote made for the support of their privileges, which they are determined thoroughly to defend against all attempts and encroachments." The Council, in an answer sent down the same day, said: "Although the Board has been in the constant practice of lessening grants made by the Honorable House ever since the Charter, yet they do not design to enter into any dispute on this point at this time," "and are willing to come into any expedient that may preserve the rights of each House. The Board would have no exception to a vote effectually securing the payment out of the Public Treasury of every reasonable expense which may attend, or be the consequence of, the actions referred to; but they apprehend that many inconveniences may arise from the granting any determinate large sum for this purpose." On February 23 a new draft of the vote was sent up by the House, and non-concurred by the Council. "Andrew Oliver, Joseph Pynchon and Thomas Hutchinson, Esquires, were appointed a committee for the Council, to examine the books of the General Assembly for precedents of the Council's lessening grants of money, &c., and make report thereof at the next sitting of the Court." On the same day the Council, upon a message from the House desiring them to do so, reconsidered their vote of non-

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concurrence, but, upon debate, again non-concurred. On February 24 the House sent up another message, insisting upon their own form of vote, and stating that they had acted "entirely from a persuasion that it is no more in the power of the Honorable Board to lessen a sum of money granted by the House than to make the grant or augment the sum; and, although the Honorable Board have said that they have been in the constant practice of lessening grants made by the House ever since the Charter, the House consider this as a sudden assertion, and impossible to be proved." The records do not show any further action of the Council, or that the committee appointed to search for precedents ever made a report. The reason may be, that, on February 26, the House passed a vote (to the effect originally suggested by the Council) that the committee for the defence of the actions before mentioned "be from time to time paid, out of the Province Treasury, such sums of money as shall be sufficient to enable them properly to defend these actions;" and this vote was concurred by the Council, and consented to by the Governor.[1]

At the same session, a vote of the House, allowing a certain sum to the Treasurer, had been non-concurred by the Council as not making adequate compensation to him, upon a report of a committee of the Council, which stated, among other things, that "the committee are very sensible that the Board have no right to enlarge any grant made by the House."[2] But in 1759, upon a bill for raising soldiers, amendments proposed by the Council, increasing the number of men to be raised and the bounty to be paid them, were considered by the House; and, although they were not adopted, no objection appears to have been taken to the right of the Council to propose them.[3]

Among the precedents transmitted to us by order of the two Houses are the remonstrance of the House of Representatives in 1759 against the issue, by the Council, of warrants on the Province Treasurer for paying the expenses of the funeral of Lieutenant-Governor Phipps, as "a misapplication of the public moneys, and unwarrantable, and which proceedings the House do remonstrate against as an infraction upon our Constitution;" and the

[1] General Court Records, February 20–26, 1756.

[2] General Court Records, February 3, 6, 1756.

[3] General Court Records, April 17, 1759.

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answer of the Council, justifying their action as in accordance with usage, and declining "at this time to enter into any dispute with the Honorable House with respect to the right of the Board to incur such small expenses, wherein they think the honor of the government concerned."[1] But this, like other controversies between the House of Representatives and the Governor and Council as to the right of the latter, in their executive capacity, to draw money out of the Treasury, appears to us to have no direct bearing on the question of privilege between the House and the Council acting as the two branches of the Legislature.

In 1760, the Treasurer's accounts for a previous year having been examined by a committee of each House respectively, the committee of the House of Representatives made their report to the House, which, by vote, accepted the same, and resolved that the Treasurer be discharged of several sums, and accountable for several other sums therein mentioned. The Council concurred in the vote, amending it, however, by striking out the preliminary words as to the acceptance of the report of the committee of the House, because, as they said in a message to the House, the Treasurer could be discharged only by act or order of the whole Legislature, and the Council chose "to see with their own eyes, and not with the eyes of the committees of the House."[2]

The House non-concurred in the amendment, and, in a message to the Council, said: "The House are sensible that an act or order of the whole General Court is requisite for the Treasurer's discharge; but the practice lately gone into by the Honorable Board, of a special examination of the Treasurer's accounts, is novel, and not within the rights belonging to them, either as the King's Council or as one branch of the Legislature. The House challenge as their special rights and privileges the sole modelling all laws for imposing taxes upon the people for the defence and support of government, also have power to inquire into and judge of the uses and occasions for which moneys are demanded or given, and to appropriate the same, and to inquire into the applications, and to censure the misapplications thereof;

[1] General Court Records, February 8, 1759.

[2] General Court Records, January 8-16, 1760.

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and by the British Constitution these powers and privileges are hereditary to the representatives of the people. And the House apprehend that the Honorable Board have no right in those cases to amend the doings of the House, but absolutely to assent to or dissent from them. The Honorable Board cannot but be sensible, that, in all bills for levying money, the House have challenged and preserved their right of the sole modelling the same. There is the same reason they should have the like power of inquiring into the applications of the moneys raised upon the people. The House know no other proper method of their making such an inquiry but by a committee of their own, and consequently no proper method of their passing the Treasurer's accounts but by an acceptance of the report of such a committee, and passing a resolve thereon."[1]

The Council, in their reply, cautiously avoided admitting or denying, as not being involved in the question at issue, either the claim of the House to the exclusive right of appropriating moneys, or the assertion of the House that the Council had no right of amendment, saying: "The House seem to have mistaken the intention of the Board. The exception which the Board take to the vote of the House relates merely to the form of it. In answer to this exception, the House urge their right to originate and frame all laws for imposing taxes, to judge of the uses for which all moneys are granted, and to appropriate all such moneys as they think fit. The board deny none of these things; but they are all entirely out of the question. The House go on to say that they have a right of inquiry into the application of all public moneys, and that, in all those cases mentioned, the Board have no right to make any amendments upon the votes of the House. That the House have a right to make such inquiry the Board do not deny; that the Board have no right to amend any votes of the House in any of these cases will be conceded to or denied when there is occasion to determine this point. At present there is none; for the vote of the House, which is the subject of the present dispute, cannot respect such an inquiry as the House claim a right to, any more than it respects the other matters mentioned by the House. The application of the public

[1] General Court Records, January 16, 17, 1760.

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moneys is made by his Excellency the Governor, with the advice and consent of the Council. The House surely will not send a vote respecting an inquiry into such application to the Board for their concurrence. The examination of the Treasurer's accounts, and an inquiry how far he has discharged himself, is quite a distinct thing from the other inquiry."[1]

The House afterwards passed a vote exactly like the former one, except in omitting the clause objected to by the Council, and inserting a recital that the Treasurer's account had not been accepted, "by reason of some disagreement between the two Houses in point of form, which may be attended with great inconvenience to the Province, if not timely prevented." And in this vote the Council concurred.[2]

In the same year, an order of the Council, accepting the report of a committee, farming out an excise for the county of Dukes County, for the year 1759, to Wilmot Wass, for a certain sum, and taking his bond with sureties to the Province Treasurer, was non-concurred by the House, solely because "the committee have not exhibited an account of charge on this affair, as has been usual in the like cases."[3] And in 1761, an order for the compensation of the sutlers of certain regiments originated and was passed in the Council, and, being non-concurred by the House, was referred to a joint committee, whose report was made to the Council, and there accepted, and afterward concurred by the House and consented to by the Governor.[4]

In January 1765 a resolve of the House, concerning the form of drawing moneys by the Province Treasurer out of the hands of the agent of the Province in England, was in the Council "concurred, taken in a new draft." The House objected, solely because the draft of the Council was headed "House of Representatives;" and in a message to the Council, said: "The Honorable Board have an undoubted right in all cases (except those of grants and money bills) to bring any vote or bill sent up from the House into a new draft. But then such new draft should be

[1] General Court Records, January 30, 1760.
[2] General Court Records, June 20, 1760.
[3] House Journal, February 7, 1760.
[4] General Court Records, March 27, April 7, 1761.

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made the act of, and passed upon by, the Honorable Board before it is sent down."[1]

In March 1765, in a message to the House, remonstrating against their having, without joining the Council, and after the Council had non-concurred a vote of the same import, published a notice to all officers and soldiers desiring of grants of land for actual settlement, to give in their names to a committee of the House, the Council observed, "That the House have considered their right to originate grants of land as similar to their right of originating grants of money is allowed;" but no exclusive privilege of the House as to either was admitted by the Council, or claimed in the messages of the House.[2]

Governor Hutchinson, in his History, writing of the same period, says: "It was a rule in joint committees, when the subject of consideration related to taxes, for the chairman to offer the report in Council, where it was read, and sent down to the House to originate a vote. In all other cases, the Council originated a vote upon the report, and sent the vote to the House, with the report, for concurrence."[3] He also says: "Though both Houses professed to pay great regard to forms of proceeding in Parliament, they were not strictly adhered to. After a vote, or even a bill, had passed both Houses, the Governor would sometimes decline his assent in the form it had passed, and propose amendments or alterations, and they have been agreed to; which is not warranted by the practice of Parliament."[4]

As the controversy between England and the Colonies upon the right of taxation grew more earnest, the House of Representatives of the Province sometimes asserted, and ultimately the Council in practice seemed to recognize, a more extensive privilege in the immediate representatives of the people. For instance, the House of Representatives, in a message to the Governor in 1767, contended that the clause in the Province Charter, which provided that the Governor and Council should have authority to issue money out of the Treasury only according to such acts as were or should be in force within the Prov-

[1] General Court Records, January 28, 30, February 7, 1765.
[2] General Court Records, June 17, 1764; March 8, 9, 1765.
[3] 3 Hutchinson, 113, note. [4] 3 Hutchinson, 90, note.

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nce, "was intended to secure to the House of Representatives the privilege of originating, granting, and disposing of taxes;"[1] and the Council at different times, from 1771 to 1774, by messages to the House of Representatives, suggested to them to take into consideration the services of the agent of the Province in England, and to make him an allowance therefor.[2] But occasional precedents, at a time when the colonists were using every possible argument to maintain their liberties against the Crown and Parliament of England and the Governor appointed by the King, are by no means conclusive evidence of the legitimate privileges of the two branches of the General Court of the Province.

We have been led to state such precedents under the Provincial government as were known to us, having any connection with the subject, at the greater length, because many of them exist only in manuscript or in very rare pamphlets, and because, if they had proved a consistent, uninterrupted and uncontested usage for a long course of years, they might have colored the meaning of the language of the Constitution adopted at the Revolution. But, so far as we can judge from the means at our command, the precedents of the time of the Province fall far short of proving that the House of Representatives habitually exercised in Massachusetts the privileges claimed by the House of Commons in England, or that it was a settled doctrine that a bill appropriating money from the Province Treasury, and not, in terms or effect, imposing any tax upon the people, must originate in the House of Representatives.

We are then brought to a consideration of the question of the meaning of the words "money bills," as understood at the time of the adoption of the Constitution of the Commonwealth, and in which they must be presumed to have been used by the framers of that instrument. Upon this point the evidence appears to us to be satisfactory and conclusive.

The bill of 1660, called on the Journal of the Commons[3] "a bill concerning money," and that of 1678, called in the contem-

[1] General Court Records, February 4, 1767. Mass. State Papers, 106.

[2] General Court Records, July 3, 1771; July 14, 1772; March 4, 1773; June 10, 1774.

[3] 8 Commons' Journals, 102.

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poraneous notes of a member[1] "The Grand Money Bill," as well as the earlier bill of 1640, to which the term "money bill" is applied in Acherley's Britannic Constitution,[2] published in 1727, were ordinary bills of supply granting taxes upon the people. In the conference of 1671, when the Commons first denied the right of the Lords to amend a supply bill, the words "bills of money" were used in the reasons of the Commons, drawn by Sir Heneage Finch (afterwards Lord Chancellor Nottingham), as synonymous with "bill of impositions," which were the words used in the reasons offered by the Lords.[3]

In 1700, the first time, so far as we are aware, when the term "money bill" appears on the parliamentary journals, it is as equivalent to a bill for raising money. The Lords, in protesting against the tacking by the Commons, of a bill for applying certain forfeited estates to the use of the public, to a bill for granting an aid by a land tax, said: "The joining together in a money bill things so totally foreign to the methods of raising money, and to the quantity or qualification of the sums to be raised, is wholly destructive of the freedom of debates, dangerous to the privileges of the Lords and to the prerogative of the Crown; for by this means things of the last ill consequence to the nation may be brought into money bills, and yet neither the Lords nor the Crown be able to give their negative to them without hazarding the public peace and security."[4]

Lord Somers, in his letter to the Secretary of State in 1698, already quoted,[5] clearly manifested his opinion that nothing was a "money bill" that did not grant money to the King. And Lord Chancellor Hardwicke, in a debate in the House of Lords in 1741, on altering a turnpike bill from the Commons, said: "This is not a money bill. In a parliamentary sense they only are such, which grant money to the Crown."[6]

Sir William Blackstone, (of whose Commentaries, first published in 1765, nearly as many copies were said, ten years after-

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[1] 6 Grey's Debates, 110. 4 Parl. Hist. 1005.
[2] Acherley's Britannic Constitution, 398.
[3] 9 Commons' Journals, 239, 243. 3 Hatsell, 372, 390.
[4] 16 Lords' Journals, 575. 3 Hatsell, 197.
[5] 2 Hardwicke Papers, 434.
[6] 12 Parl. Hist. 144.

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wards, to have been sold in America as in England,[1]) after stating that "it is the ancient indisputable privilege and right of the House of Commons that all grants of subsidies or parliamentary aids do begin in their House, and are first bestowed by them," and observing that "herein they will not suffer the other House to exert any power but that of rejecting, they will not permit the least alteration or amendment to be made by the Lords to the mode of taxing the people by a money bill," adds this definition: "Under which appellation are included all bills by which money is directed to be raised upon the subject, for any purpose, or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates and the like."[2]

Although Blackstone differs from Lord Somers and Lord Hardwicke so far as to include a local tax, all three concur in excluding bills by which no tax whatever is raised, from the definition of money bills. And the most eminent constitutional historian of England agrees rather with Somers and Hardwicke than with Blackstone, and says, "I must confess, that when the wise and ancient maxim, that the Commons alone can empower the King to levy the people's money, was applied to a private bill for lighting and cleansing a certain town, or cutting dikes in a fen, to local and limited assessments for local benefit, (as to which the Crown has no manner of interest, nor has anything to do with the collection,) there was more disposition shown to make encroachments than to guard against those of others."[3]

Mr. Hallam, throughout his discussion of "money bills," treats it as their essential characteristic that they grant money from the people to the Crown.[4] And Sir Erskine May, in considering the Paper Duties Repeal Bill of 1860, says: "Nor was this strictly and in technical form a money bill. It neither granted any tax to the Crown, nor recited that the paper duty was repealed in consideration of other taxes imposed."[5]

The Constitution proposed by the General Court of Massachusetts, and rejected by the people in 1778, contained the following

[1] 2 Burke's Works, 86.
[2] 1 Bl. Com. 169, 170.
[3] 3 Hallam, 31, 32.
[4] 1 Hallam, 276. 3 Hallam, 27–32.
[5] 1 May's Const. Hist. 448.

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article: "The Senate and House of Representatives shall be two separate and distinct bodies, each to appoint its own officers, and settle its own rules of proceedings; and each shall have an equal right to originate or reject any bill, resolve or order, or to propose amendments to the same, excepting bills and resolves levying and granting money or other property of the State, which shall originate in the House of Representatives only, and be concurred or non-concurred in whole by the Senate."[1] The address of a convention of delegates held in the county of Essex in the spring of that year, opposing the adoption of that Constitution, (which address is commonly known as the Essex Result, and is understood to have been written by Theophilus Parsons, afterwards Chief Justice of Massachusetts,) describes that article thus: "Each branch hath a negative upon the other, and either branch may originate any bill, or propose any amendment, except a money bill, which should be concurred or non-concurred by the Senate in the whole."[2] This passage has been sometimes cited as showing that that great lawyer considered money bills to include distinct bills appropriating money in the Treasury, as well as bills levying taxes. But the words of the article are, not "bills and resolves levying or granting money or other property," but "levying and granting," which may fairly mean only bills of supply which both levy money upon the people and grant it to the government; and, notwithstanding the obscurity created by the addition of the words "of the State," the reasonable inference appears to be, that the money and property intended were those of the inhabitants as collectively constituting the State, and that the word "granting" was used, not, as it often is, to denote gifts from the government to individuals of the public money or lands, but in the same sense as in the English authorities before quoted, and by Mr. Parsons himself in the Convention which ratified the Federal Constitution in 1788, when he said, "The reason why the Lords have not this power" ("of proposing alterations or amendments in money bills") "is founded on a principle in the English Constitution, that the Commons alone represent the whole property of the nation; and, as a money bill is a grant to the King,

[1] Journal of Convention of 1779–80, appendix, 261. Bradford's Hist. Mass. appendix, 471.

[2] Parsons's Life of Parsons, 48–51, 394.

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none can make the grant but those who represent the property of the nation."[1] But if the article upon this subject in the rejected Constitution of 1778 should be considered of doubtful or different meaning, it can only be because of the words inserted therein, that are not repeated in the Constitution adopted in 1780 and which governs the question before us.

In the Convention of 1787 which framed the Constitution of the United States, after repeated attempts to confer upon the national House of Representatives the exclusive right of originating "bills for raising or appropriating money,"[2] the provision upon the subject was finally adopted in this form, "All bills for raising revenue shall originate in the House of Representatives," with the additional clause, (taken from the Constitution of Massachusetts,) "but the Senate may propose or concur with amendments, as on other bills."[3]

According to many authorities of the greatest weight, the term "bills for raising revenue," as here used, is exactly equivalent to "money bills." In 1788, in the Convention of Massachusetts which ratified the Federal Constitution, Increase Sumner, then a Justice of the Supreme Judicial Court, and afterwards Governor of the Commonwealth, said that one security in the hands of the people under this Constitution was, that "all money bills are to originate with the House of Representatives." And Theophilus Parsons said, "Under this Constitution, an equal representation immediately from the people is introduced, who by their negative, and the exclusive right of originating money bills, have the power to control the Senate, where the sovereignty of the States is represented."[4] Both these eminent citizens had been members of the Convention that framed the Constitution of Massachusetts eight years before. A paper, written either by Mr. Hamilton or by Mr. Madison, in the Federalist, in the same year, speaks of "the equal authority which will subsist between the two Houses on all legislative subjects, except the originating of money bills."[5] James Wilson, also a member of the Conven-

[1] Debates in Massachusetts Convention of 1788 (ed. 1856) p. 193.
[2] Madison Papers, 1024, 1228, 1305, 1316, appendix, xvii.
[3] Madison Papers, 1531, 1609. Const. U. S. art. 1, sect. 7.
[4] Debates in Massachusetts Convention of 1788, pp. 163, 191.
[5] Federalist, No. 58. Introduction to Dawson's edition.

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tion that framed the national Constitution, and one of the first Justices of the Supreme Court of the United States, in his Lectures on Law, delivered at Philadelphia in 1790 and 1791, repeatedly speaks of that Constitution as having directed that "money bills shall originate in the House of Representatives."[1] And Mr. Justice Story, in his Commentaries on the Constitution, speaks of "bills for raising revenue" as "what are technically called 'money bills,'" and of the Constitution of the United States as conferring on the House of Representatives "the exclusive right to originate money bills."[2]

In the face of this accumulation of authorities, English and American, the use of the words "money bills" in some recent treatises,[3] as including appropriation bills, seems to us of little value upon the question of the meaning of these words at the time of the adoption of the Constitution of the Commonwealth. But this is not all.

Questions of the construction of a Constitution which has been long in force are not to be decided by a mere interpretation of the language of the instrument, but are in a great degree historical questions, upon which the practical exposition by those branches of the government charged with the duties of administration and legislation, especially if nearly contemporaneous with the establishment of the Constitution, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive.[4] This rule of construction has been frequently applied by the courts as a test of the constitutionality of acts of the executive[5] or of the legislative department.[6]

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[1] 1 Wilson's Works, 445. 2 Wilson's Works, 161.

[2] Story on the Constitution, §§ 871, 873.

[3] Cushing's Law and Practice of Legislative Assemblies, §§ 2304, 2361, 2369. 1 Todd's Parliamentary Government, 525. Cox's Institutions of the English Government, 198.

[4] 1 Kent Com. 465, & note. Story on the Constitution, § 408. Cooley Const. Lim. 69.

[5] *Surgett* v. *Lapice*, 8 How. 48, 68. *Commonwealth* v. *Lockwood*, 109 Mass. 323, 339. *Commonwealth* v. *Costley*, 118 Mass. 1, 36.

[6] *Stuart* v. *Laird*, 1 Cranch, 299, 309. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 401. *Portland Bank* v. *Apthorp*, 12 Mass. 252, 257. *Commonwealth* v. *Parker*, 2 Pick. 550, 556. *Holmes* v. *Hunt*, 122 Mass. 505, 516.

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For instance, in a case in which it was contended that the judges of the federal courts had not been commissioned according to the Constitution, the Supreme Court of the United States said: "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."[1] And in a case involving the validity of a tax act passed by the Legislature of the Commonwealth, Chief Justice Parker, delivering the judgment of the Supreme Judicial Court, said, "In questions touching the powers of government under a written Constitution, not affecting the essential rights of the citizen, the practice and usage of successive Legislatures, from the time the government began, when its powers, as well as the rights of the subject, were well understood, and when there was a general disposition to keep all the departments within their prescribed sphere, down to the present time, may furnish strong grounds for explanation of parts which are obscure, or not perfectly explicit."[2]

The Constitution of the Commonwealth contains the following provisions: "No subsidy, charge, tax, impost or duties ought to be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the Legislature."[3] "The department of legislation shall be formed by two branches, a Senate and House of Representatives, each of which shall have a negative on the other. The legislative body shall be styled the General Court of Massachusetts."[4] "Full power and authority are hereby given and granted to the said General Court, from time to time," to make laws, to choose or provide for the choosing of civil officers, and set forth their duties and powers, "and to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Com-

[1] 1 Cranch, 309.
[2] 12 Mass. 257.
[3] Declaration of Rights, art. 23.
[4] Chap. 1, sect. 1, art. 1.

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monwealth, and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured or being within the same." "And while the public charges of government, or any part thereof, shall be assessed on polls and estates in the manner that has hitherto been practised; in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth, taken anew once in every ten years at least, and as much oftener as the General Court shall order."[1] "All money bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."[2]

In the opinions required by the two Houses, and delivered by the Justices of the Supreme Judicial Court in 1781, affirming the equal right of the Senate with the House of Representatives in examining and adjusting the lists of valuation returned from the several towns as a rule for their future conduct in making laws imposing public taxes, Chief Justice Cushing said, "I suppose a money bill to be a bill imposing a direct tax upon the people;" and each of his associates, more or less distinctly, concurred in that view. All these judges had been members of the Convention that framed the State Constitution the year before; and peculiar respect is due to the opinion, expressed in such a way as to show that it had not occurred to him there could be a doubt upon the matter, of Chief Justice Cushing, who was a member of the highest court of judicature of the Province and of the State from 1772 to 1789, and who was appointed by President Washington the first Associate Justice, and afterwards Chief Justice, of the Supreme Court of the United States, but declined the latter office. It is also to be noticed that he and his associates did not consider the usage under the English Constitution or the Royal Charter as controlling the construction of the Constitution of the Commonwealth, under which senators as well as representatives are elected directly by the people.[3]

The lists, transmitted to us by order of the two Houses,[4] of

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[1] Chap. 1, sect. 1, art. 4.
[2] Chap. 1, sect. 3, art. 7.
[3] *Opinions of Justices*, *ante*, 547.
[4] Senate Doc. 1878, No. 253.

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bills and resolves originating in the Senate within the first ten years after the establishment of the Constitution, include bills or resolves for levying duties and excises, regulating fees of public officers, abating taxes of particular towns, authorizing the Treasurer of the Commonwealth to borrow money and issue certificates therefor, establishing a mint, making appropriations for public purposes of moneys in the Treasury, and directing the payment of such moneys to delegates in Congress, members of the General Court and of the Council, civil officers, military officers and soldiers, and private individuals, besides a resolve granting a special tax to be levied on the polls and estates of the county of Middlesex for building a new jail, and bills or resolves for levying taxes on towns not incorporated, and which therefore, under the Constitution, were not then represented in the Legislature except in the Senate.[1]

This course of proceeding, at least as far as regards bills or resolves appropriating and directing the payment of money from the Treasury, was not established without early and thorough discussion of the question whether such bills or resolves were money bills within the meaning of the Constitution.

On June 5, 1783, a resolve, "granting £3 18*s.* 6*d.* to Samuel Hinckley in full for conveying letters from the Sheriff of Hampshire to the General Court," was passed by the Senate, and sent down for concurrence. The House non-concurred, and referred the account of Mr. Hinckley to a committee, and afterwards originated and sent up a like resolve. On June 13, according to an entry in the Senate Journal, "The question being put, whether it be the opinion of the Senate that a bill or resolve for granting money out of the public Treasury may originate in the Senate, — that clause in the Constitution, 'All money bills shall originate in the House of Representatives,' notwithstanding, — it passed in the affirmative, seventeen out of twenty." On June 20, both Houses appointed committees of conference upon the subject of the resolve, the chairman of the committee on the part of the House being Theodore Sedgwick, afterwards Speaker of the national House of Representatives, and a Justice of the Supreme Judicial Court of the Commonwealth. On July 4 this committee reported to the Senate as follows: "Consider-

[1] Chap. 1, sect. 2, art. 2; sect. 3, arts. 2, 3, 4.

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ing the multiplicity and importance of the public business now before the General Court, necessary to be immediately attended to, and the near approach of a recess thereof, that, during the remainder of the present session of the General Court, all grants shall originate in the House of Representatives, but that the question of privilege and right shall not be considered as affected by this agreement, but shall be open for future discussion; and that this agreement shall be entered on the journals of both Houses." This report was amended by striking out the words "the House of Representatives," and inserting "either House," and in this form was sent to the House for concurrence. The House refused to concur, and the Legislature adjourned without further action on the subject. On September 24 the same Legislature met again, and on October 9 the House passed a resolve substantially like the original resolve of the Senate, in which the Senate non-concurred. On October 14, as is stated on the House journal, "The House took into consideration the right of the two branches of the Legislature to originate the grant of moneys, and the following was made a question; viz. 'Whether an order for the payment of any moneys for services, as done agreeably to an establishment by the General Court, can constitutionally originate in the Honorable Senate?' Which was voted in the affirmative, ninety-five members present, sixty-two yeas." On October 17, the House sent up a message to the Senate, requesting them to send down the account of Mr. Hinckley and the resolve of the Senate thereon; and, the same having been brought down, "the House reconsidered their respective votes of non-concurrence, and concurred with the original vote of the Senate, granting to the accountant £3 18*s.* 6*d.*" And on the same day the resolve was approved by Governor Hancock. Samuel Adams was then President of the Senate; and he and twelve other senators, including the three members of the Senate committee of conference, had been members of the Convention that framed the Constitution of 1780; and in the House of Representatives, besides Theodore Sedgwick, were James Sullivan, Tristram Dalton, William Phillips, Rufus King, and Nathan Dane.[1]

[1] Senate and House Journals. 1783. President Pitman's Opinion, Senate Doc. 1869, No. 275, pp. 8–10

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The smallness of the sum involved was evidently not thought to impair the weight of the precedent thus established; for the same rule was afterwards constantly followed by the two Houses, without question, upon resolves making large appropriations of money; and on March 11, 1785, the Senate entered on their journal the following declaration:

"Whereas His Honor the Lieutenant-Governor, on the twenty-second day of February last, in his message to the Honorable House of Representatives, laid before the said House a letter from the delegates of this Commonwealth in Congress, whereby information was received that the said delegates had drawn a bill of exchange on the Treasurer for two hundred and sixty Mexican dollars, in consequence whereof a resolve has passed the said House of Representatives to request the Governor, with the advice of the Council, to issue his warrant for the payment of the said sum, and directing the Treasurer to discharge the said draft, which resolve has this day been concurred; and whereas it is the undoubted and acknowledged privilege of the Senate, equally with the House of Representatives, to originate grants of money, by reason whereof the said message ought to have been directed to both branches of the Legislature, and as the silence of the Senate on the subject might be construed as a relinquishment of the privilege aforenamed: it is therefore hereby declared, that the privilege aforesaid is the undoubted right of the Senate, and that the proceedings aforesaid ought not to be, nor shall the same at any future time be, drawn into precedent. Ordered, that the above declaration be entered on the journal."[1]

We have not been furnished with any precedents later than 1790, and it is assumed in the carefully prepared opinions of the presiding officers of each House, which have been transmitted to us, that the right of originating bills appropriating money from the Treasury was habitually exercised by the Senate from 1783 to 1868. During that period two Conventions to revise and amend the Constitution of the Commonwealth were held, the one in 1820, the other in 1853; in neither of which, so far as we are informed, was the subject mentioned in any way, except that on May 17, 1853, an order was adopted to inquire into the expe-

[1] Senate Journal, 1785. Senate Doc. 1869, No. 275, pp. 10, 11.

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diency of "so altering or amending the Constitution as to provide that all bills and resolves authorizing the expenditure of money or the payment of money from the Treasury of the Commonwealth shall originate in the House of Representatives;" and this order was referred to a committee, which, on May 31, reported that it was inexpedient to act thereon, and this report was accepted by the Convention.[1] The practice of bringing in general appropri ation bills, first introduced in this Commonwealth by the Legis lature of 1858,[2] did not, as is sufficiently shown by the list of acts and resolves of 1863 and 1864, appended to Mr. President Pitman's opinion,[3] interrupt the exercise by the Senate of the right to originate bills or resolves making special appropriations of money for particular purposes.

The conclusion appears to us inevitable, that the construction undoubtingly assumed by the Justices of the Supreme Judicial Court in advising the two Houses of the Legislature in 1781, and deliberately considered and determined by concurrent action of the Senate and House of Representatives two years later, and acquiesced in without further contest for eighty-five years afterwards, must be deemed to have been thereby established as the true construction of the Constitution.

This conclusion is fortified by considering the reason on which the privilege of the House of Commons rests, which is well stated by Blackstone, as follows: "The Lords, being a permanent hereditary body, created at pleasure by the King, are supposed more liable to be influenced by the Crown, and, when once influenced, to continue so, than the Commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the Lords any power of framing new taxes for the subject: it is sufficient that they have a power of rejecting, if they think the Commons too lavish or improvident in their grants."[4] Such a reason has no force here.

Even in the Constitution of the United States, under which the senators are not elected by the people, but by the Legis-

[1] Documents of Convention of 1853, No. 21. 1 Debates in Convention of 1853, pp. 160, 425.

[2] Sts. 1858, *cc.* 1, 11.

[3] Senate Doc. 1869, No. 275, pp. 15, 22.

[4] 1 Bl. Com. 169.

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latures of the several States, many leading members of the Federal Convention, such as Washington,[1] Madison,[2] Roger Sherman,[3] Oliver Ellsworth,[4] James Wilson,[5] and Gouverneur Morris,[6] thought it unwise to impose any restriction on the legislative power of the Senate. In this Commonwealth, where the senators, as well as the representatives, have always been chosen directly by the people, (although, under the Constitution as originally adopted, they were apportioned among the counties according to the proportion of the public taxes paid by each, while the representatives were distributed among the several towns according to the number of ratable polls,[7]) the people are amply protected against any danger of oppression, by the security from being compelled to pay any money towards the support of the government or the discharge of its obligations, otherwise than by an enactment originating in the House of Representatives. And since the amendments of the Constitution, adopted in 1855, by which the members of both Houses alike are elected by districts, according to the number of legal voters in each,[8] there is certainly no reason for enlarging the exclusive privilege of the House of Representatives beyond the limit before established.

The result is, that, having regard to the history of the subject, to the settled meaning of the words "money bills" at the time of the adoption of the Constitution of the Commonwealth, and to the contemporaneous construction of that Constitution by the Justices of the Supreme Judicial Court and by both Houses of the Legislature, affirmed by a continuous and uniform practice of eighty-five years, we are of opinion that the exclusive constitutional privilege of the House of Representatives to originate money bills is limited to bills that transfer money or property from the people to the State, and does not include bills that appropriate money from the Treasury of the Commonwealth to particular uses of the government, or bestow it upon individuals or corporations; and

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[1] Madison Papers, 1316, note.
[2] Ibid. 856, 1267, 1271.
[3] Ibid. 857.
[4] Ibid. 1271.
[5] Ibid. 1041, 1097, 1267, 1271, 1308.
[6] Ibid. 1043, 1266, 1272.
[7] Chap. 1, sect. 2, art. 1; sect. 3, art. 1.
[8] Amendments 21, 22.

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Therefore, that the questions proposed by the Honorable Senate and the Honorable House of Representatives respectively must be answered as follows:

First. The Senate can, under the provisions of chapter 1, section 3, article 7, of the Constitution, originate a bill or resolve appropriating money from the Treasury of the Commonwealth.

Second. The Senate can, under those provisions, originate a bill or resolve involving directly or indirectly the expenditure of money from the Treasury, or imposing a burden or charge thereon.

Third. The power to originate a bill appropriating money from the State Treasury is not limited by the Constitution to the House of Representatives, but resides in both branches of the Legislature.

HORACE GRAY.
JAMES D. COLT.
SETH AMES.
MARCUS MORTON.
WILLIAM C. ENDICOTT.
OTIS P. LORD.
AUGUSTUS L. SOULE.

Boston, December 31 1878

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Opinion of the Justices to the Governor and Council.

The "senior deputy sheriff in service," who, by the St. of 1877, c. 200, § 23, is required, in case a vacancy occurs in the office of sheriff in any county, to perform all the duties required by law to be performed by the sheriff, until the office of sheriff is filled in the manner required by law, is the deputy sheriff who has been longest in office continuously when the vacancy occurs.

On March 8, 1879, the following order was adopted by the Governor and Council, and transmitted by the Governor to the Justices of the Supreme Judicial Court, who on March 10 returned the opinion which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be respectfully required on the following important question of law, arising on the solemn occasion of the death of the Sheriff of Middlesex County, and of the impendency of the execution of William Henry Devlin for murder.

Is the "senior deputy sheriff in service," who is authorized, under section twenty-three of chapter two hundred of the acts of the year eighteen hundred and seventy-seven, to act in case of a vacancy in the office of sheriff, the deputy sheriff who has been longest in office continuously, or

(2d.) The deputy sheriff whose original appointment is of the earliest date, but who has not remained continuously in office since then, or

(3d.) The deputy sheriff who has served the greatest number of years, though not continuously, or

(4th.) The deputy sheriff who is oldest in years?

The Justices of the Supreme Judicial Court, having considered the question upon which their opinion has been required by His Excellency the Governor and the Honorable Council, respectfully submit it as their opinion that the Legislature, in enacting that, "whenever a vacancy occurs in the office of sheriff in any county, the senior deputy sheriff in service shall perform all the duties required by law to be performed by the sheriff, until the office of sheriff is filled in the manner required by law, giving bond as now required by law of sheriffs," has not, by the words "the senior deputy sheriff in service," designated the deputy sheriff in office when the vacancy occurs, who is oldest in years only, nor

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the one whose original appointment was of the earliest date, but who has not since remained continuously in office; nor yet the one who has served for the greatest number of years, but not continuously; but has designated, as the officer to perform the duties of sheriff during the vacancy, the deputy sheriff "senior in service" when the vacancy occurs, that is to say, the one who has then been longest in office continuously.

HORACE GRAY.
JAMES D. COLT.
SETH AMES.
MARCUS MORTON.
WILLIAM C. ENDICOTT.
OTIS P. LORD.
AUGUSTUS L. SOULE.

Boston, March 10, 1879.

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ACTION.

1. In an action of tort, the declaration alleged, that the mother of the plaintiff, being about to be delivered of the plaintiff, employed the defendant as a midwife; that the defendant, while so employed, pretending to be competent and skilful in treating diseases of the eyes, such as the plaintiff then had, undertook the treatment of the plaintiff, and refused to allow a regular physician to be called in, and so negligently and unskilfully treated the plaintiff that the plaintiff became totally blind. The plaintiff's evidence tended to show the employment of the defendant; that a disease of the plaintiff's eyes, a few days after birth, was called to the attention of the defendant, who said she could cure it, and had cured other children so affected, and told the plaintiff's mother not to call in a physician; that she prescribed simple washes; and that the plaintiff soon after became blind. There was also expert testimony to the effect that the disease was a serious one, which probably could have been cured had it been properly treated in time; that the defendant's remedies were not proper in such a case, and that more severe remedies were required. *Held*, in the absence of evidence that the care of the child's eyes was included in the ordinary duties of a midwife, that it must be considered as not embraced in the contract; that the defendant's services in regard to the eyes were gratuitously rendered; and that the jury would not be warranted in returning a verdict for the plaintiff. *Held, also*, that a question to a witness for the plaintiff, if she knew what duties the defendant took upon herself in the general course of her business as midwife, was properly excluded. *Higgins* v. *McCabe*, 18.
2. The owner of a building, leased to a tenant who occupies it, is not liable to a person who, in passing along a walk leading from the street to the building, for the purpose of transacting business with the tenant, is injured by falling down an embankment adjoining the walk, although the estate was in that condition prior to the letting. *Mellen* v. *Morrill*, 545.

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3. The owner of a wharf and dock, who dredges out a channel from his dock over flats belonging to other persons and lying between high and low-water mark, cannot recover damages from a city for an injury to the channel by the discharge of sewage from a common sewer into the dock, whereby the channel is partly filled up and the owner put to additional expense in getting vessels to his wharf; although he dredged out the channel openly and with a claim of right. *Breed* v. *Lynn*, 367.

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1. If the defendant in a criminal case, after a demurrer to the indictment against him has been overruled, has pleaded over and been found guilty, the case is ripe for final judgment and sentence, and he can then bring the questions of law ruled against him to this court by appeal, without such sentence having been actually awarded. *Commonwealth* v. *McCormack*, 258.

2. A ruling of the Superior Court on a motion for a new trial, so far as it proceeds on matters of fact or of discretion, or on questions of law which

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are or might have been raised before verdict, is not the subject of an appeal; and, if the exceptions of a party at the trial in that court are overruled by this court, he cannot, by moving for a new trial or in arrest of judgment in the court below, and appealing to this court from the overruling of such motions, entitle himself to be heard anew, either in that court or in this, upon the correctness of the judgment overruling his exceptions. *Caverly* v. *McOwen*, 222.

3. An appeal from the judgment of a magistrate upon charges of fraud, under the Gen. Sts. *c.* 124, § 31, against a person applying to take the oath for the relief of poor debtors, by which the debtor is adjudged guilty of some of the charges and not guilty of others, vacates the whole judgment, and opens the case for trial upon all the charges. *Clatur* v. *Donegan*, 28.

4. If a declaration in set-off is seasonably filed in an inferior court, and is transmitted with the other papers in the case to the Superior Court on appeal, it need not be filed anew in the latter court in order to warrant the admission of evidence in support of it. *Manson* v. *Arnold*, 399.

5. At the trial, on appeal, of a complaint charging the defendant with keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, the conviction of the defendant must be of the same offence of which he was convicted in the court below, but need not be upon the same evidence. *Commonwealth* v. *Ronan*, 59.

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If a chattel, sold on condition that, until paid for, no title shall vest in the purchaser, and that, if not paid for as agreed, the seller shall have the right to enter upon the premises of the purchaser and take the chattel away, is taken to a room hired by the purchaser in the house of a third person,

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who has no knowledge of his title, the seller, on breach of the condition in regard to payment, has a right to enter such house in a reasonable manner to get the chattel; but if the purchaser of the chattel is absent, and the wife of the owner of the house, in the absence of her husband, requests the seller to wait two hours until the purchaser returns, it is not reasonable for the seller to push the wife aside and enter, and, if he does so, an action may be maintained against him for an assault, although he shows the agreement to her, and tells her for what he has come. *Drury* v. *Hervey*, 519.

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The Gen. Sts. *c.* 121, § 84, relating to the removal and punishment of attorneys at law for deceit, malpractice or other gross misconduct, and to their liability in damages to parties injured thereby, do not prevent the defendant, in an action by an attorney at law for services rendered, from showing that they were of no value. *Caverly* v. *McOwen*, 222.

AUDITOR.

1 An auditor's general finding, as *prima facie* evidence, may be overcome by the particular facts and the evidence stated in his report and warranting a different conclusion. *Blackington* v. *Johnson*, 21.

2. In an action for money lent to a benevolent society by its superintendent, the plaintiff put in evidence the report of an auditor in his favor, which stated that the plaintiff had general charge of the receipts and expenditures of the society, and rendered his accounts at stated intervals; that in his accounts he charged himself not only with money actually received, but also with accounts due the society which he considered good and expected to collect; and that, to make good the deficiency, he lent the society money from time to time; that the board of managers did not authorize the plaintiff to do so, but that there was no vote of the board forbidding it; that, at each time the accounts were settled, the plaintiff was asked

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whether that was his whole account, and he answered that it was. The defendant put in evidence several receipts of the defendant, given during the time covered by his account, acknowledging the receipt of sums of money of the society for money expended by the plaintiff for the society, the aggregate of which was larger than the amount sued for, but which contained no mention of money lent. Only one of these receipts was in evidence at the hearing before the auditor. The auditor's report and these receipts were the only evidence in the case. *Held*, that the judge rightly refused to rule, as matter of law, that the plaintiff was entitled to recover. *Hamilton* v. *Boston Port Society*, 407.

AUTREFOIS ACQUIT OR CONVICT.

1. An acquittal on a complaint for keeping and maintaining a tenement for the illegal sale and illegal keeping of intoxicating liquors from January 1 to May 28, is a bar to a complaint for keeping the same tenement for the same purpose from January 1 to August 20 of the same year. *Commonwealth* v. *Robinson*, 259.
2. A verdict of guilty on an indictment for keeping and maintaining a tenement for the illegal sale and illegal keeping of intoxicating liquors, upon which no judgment has been rendered, and to the rulings at the trial of which exceptions are still pending, is no bar to a complaint for the same offence. *Commonwealth* v. *Fraher*, 265.
3. To an indictment for larceny, the defendant filed a plea in bar, averring that he had been arraigned on a complaint before a municipal court, "and said complaint was dismissed; and he was lawfully discharged and acquitted on said complaint of the same offence with which he is now charged in said indictment." *Held*, that a demurrer to the plea was properly sustained. *Commonwealth* v. *Bressant*, 246.

BAIL.

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BANKRUPT.

1. Under a devise to a man and his wife for their lives, and upon their death to such of their children named in the will as shall then be living, the interest of a child will pass by an assignment of his estate in bankruptcy under the U. S. St. of March 2, 1867, § 14, in the lifetime of the parents. *Belcher* v. *Burnett*, 230.
2. An assignee in bankruptcy has no better title than the bankrupt, except in goods conveyed in fraud of creditors. *Kenney* v. *Ingalls*, 488.

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3. In an action for the conversion of personal property, on the issue whether the plaintiff's claim was founded on the fraud of the defendant, so as not to be affected by his discharge in bankruptcy, the judge found that the defendant took the property in question from the plaintiff's store during the absence of the latter, under a claim of right which he honestly entertained; and that there was in fact no fraud on the part of the defendant. *Held*, that the judge rightly refused to rule that, as matter of law, there was a fraudulent taking by the defendant. *Brenner* v. *Duard*, 400.

See REVIEW.

BAR.

See AUTREFOIS ACQUIT OR CONVICT.

BASTARDY PROCESS.

1. A bastardy process is not transferred to the Superior Court by "appeal or removal," within the meaning of the St. of 1876, *c.* 60; and may be tried in that court, on certified copies of the papers in the inferior court. *Biggane* v. *Ross*, 238.
2. Evidence that the complainant, in a bastardy process, had criminal intercourse with a man, other than the respondent, less than seven and a half months before the birth of her child, is inadmissible, in the absence of evidence that the birth was premature. *Ronan* v. *Dugan*, 176.

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See EVIDENCE, 6.

BETTERMENT.

On a petition to the Superior Court, under the St. of 1871, *c.* 382, for a jury to revise an assessment of betterments, which has, since the petition was brought, been adjudged void by this court on *certiorari*, the petitioner is not entitled to go to a jury; and the petition may properly be dismissed without costs to either party. *Breed* v. *Lynn*, 290.

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See MANDAMUS.

BOARD OF HEALTH.

See NUISANCE, 8.

BOND.

1. A bond described a bound of a way as running from a certain point, "on a straight line to the shop of A." There was evidence that at the date of the bond there was an outside platform extending along the front of A.'s shop, built at the same time with it, and resting on the same foundation. *Held*, that, if the platform was part of the building, the line ran to the corner of the platform, and that whether the platform was a permanent or a temporary part of the building was immaterial. *Dunham* v. *Gannett*, 151.

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2. A bond given by a deputy sheriff to a sheriff recited the appointment of the former by the latter, but did not state the time of appointment or term of office. The condition of the bond was, that, if the deputy shall faithfully perform the duties of his office, and save the sheriff harmless from all judgments, costs and expenses which may at any time happen to him, or to which he may be subjected in any manner in consequence of said appointment, the bond was to be void; otherwise, to remain in force. Prior to the execution of the bond, the deputy attached property on a writ and sold it, under the Gen. Sts. *c.* 123, § 72. The case was settled before entry, and the writ was not returned to court. The deputy refused, on demand, to deliver the proceeds of the property sold. After the execution of the bond, the owner of the property sold sued the sheriff for the default of his deputy, and recovered judgment against him, which was paid. *Held*, that an action by the sheriff against a surety on the bond could not be maintained. *Thomas* v. *Blake*, 320.

3. Under the Gen. Sts. *c.* 101, § 21, the administrator of the next of kin may bring an action on a probate bond without obtaining leave of the Probate Court. *White* v. *Weatherbee*, 450.

4. A bond given to a judge of probate by a person who is simply a trustee under an oral appointment, is not a valid probate bond; and the sureties on the bond are not estopped from setting up that defence by a recital in the bond that such person "had been duly appointed trustee." *Conant* v. *Newton*, 105.

5. The St. of 1873, *c.* 253, relating to bonds given in the Probate Court, where there is any want of jurisdiction in the court, is not retrospective. *Ib.*

6. A bond given to a judge of probate by a person who is simply a trustee under an oral appointment, and which is not a valid probate bond, is not good at common law, if the sureties on the bond signed it under a mistaken belief that the trustee was subject to the jurisdiction of the Probate Court. *Ib.*

See CITY; JUDGMENT, 3.

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BURNING.

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CHECK.

See PAYMENT.

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CHILD.

See WILL.

CITY.

In an action on a bond, dated in 1867, and conditioned for the faithful performance by A. of the duties of water registrar of a city, it appeared that by the ordinances of the city, passed in 1867, a water registrar was to be elected by the water board, and "hold office during the pleasure of the board," and give bonds for the faithful performance of his duties; that under these ordinances A. was duly elected water registrar in 1867, and continued to perform the duties of the office until 1876, without any other election; and that in 1870 the city made a general revision of its ordinances, the new ordinances reënacting the provisions of the old as to the water board without any material change, and containing the following provision: "All ordinances heretofore passed by the city council of the city are hereby repealed; but such repeal shall not affect any act done, any right accruing, accrued or established, the tenure of office of any person holding office at the time it takes effect, or any forfeiture or penalty heretofore incurred." *Held*, that the office of water registrar was not vacated by the revision; and that the sureties on his bond were liable for a default occurring after the revision. *Cambridge* v. *Fifield*, 428.

See ACTION, 3; CONSTITUTIONAL LAW, 3; DAMAGES; EQUITY, 9; INTOXICATING LIQUORS, 3; NUISANCE; PLEADING, 1; SEWER; TRUST AND TRUSTEE, 2; WAY.

COLLECTOR.

See TAX, 2–4.

COMPLAINT.

1. If a complaint to a Police Court, purporting to be made by "W. S.," and signed "W. F.," upon which the defendant is tried and convicted in the Superior Court, is amended in that court, after verdict, so as to make it appear that the signature was made by W. S., to which complaint, as amended, the defendant is not called upon to plead, he is entitled to a new trial. *Commonwealth* v. *Foynes*, 267.
2. If the age of a defendant, in a criminal case, does not appear upon the record, the objection that, under the St. of 1877, *c.* 210, § 5, the court has no jurisdiction, cannot be availed of by a motion to dismiss or in arrest of judgment. *Commonwealth* v. *Donahue*, 51.

See AUTREFOIS ACQUIT OR CONVICT; EVIDENCE, 1; INTOXICATING LIQUORS, 2, 6–8; JUSTICE OF THE PEACE.

CONDITION.

See ASSAULT; DEED, 4, 5; SALE, 2, 3.

CONFESSION.

See EVIDENCE, 18.

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CONFLICT OF LAWS.

See INTEREST.

CONSIDERATION.

See CONTRACT, II.

CONSTITUTIONAL LAW.

1. Under the Constitution of the Commonwealth, the Senate has an equal right with the House of Representatives to originate an inquiry into the returns made from the towns, for the purpose of settling a valuation, and of concluding on the proportion of ratable property within each town. *Opinions of Justices*, 547.
2. The exclusive privilege of the House of Representatives, under the Constitution of the Commonwealth, *c.* 1, sect. 3, art. 7, to originate money bills, is limited to bills that transfer money or property from the people to the State, and does not include bills that appropriate money from the Treasury of the Commonwealth to particular uses of the government, or bestow it upon individuals or corporations. *Opinion of Justices*, 557.
3. The St. of 1875, *c.* 99, § 11, conferring upon the mayor and aldermen of a city, or the selectmen of a town, or any police officer or constable "specially authorized by them," power to "enter upon the premises of any person licensed to sell under this act, to ascertain the manner in which such person conducts his business, and to preserve order," is a reasonable exercise of the police power of the Commonwealth, and is constitutional. *Commonwealth* v. *Ducey*, 269.

See JUDGE; NUISANCE, 1, 2; RECOGNIZANCE.

CONTRACT.

I. *Making.*

See CORPORATION, 1; INSURANCE, 2.

II. *Consideration.*

1. In an action on a promissory note, signed by the defendant's intestate, and payable to the plaintiff "after death," it appeared that an engagement of marriage had existed between the plaintiff and the intestate; that the latter was subject to heart disease and when ill had frequently sent for the plaintiff to come and take care of him; that, on the night before the date of the note, the intestate had an unusually severe attack, and said that "if he got out of that he must have some writing done;" that the next day he made and signed the note, and handed it to the plaintiff in a sealed envelope, saying "there was something which would provide for her in case anything should happen to him, that if they were married, and he wanted it given up, he should expect her to give it up," to which she assented; and that, before and during their engagement, the plaintiff had taken care of his wardrobe, repaired his clothing and bought various articles for him, and taken care of him when he was ill. *Held*, that the note was

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intended by the intestate as a provision for the plaintiff by way of gift out of his estate, and no action could be maintained on it. *Warren* v. *Durfee*, 338.

See ACTION, 1; PROMISSORY NOTE, 2

III. *Validity.*

See WAGER.

IV. *Construction.*

2. An agreement between A. and B., by which A. is to take charge of B.'s brick-yard, and to have the brick made "in the best manner and at the lowest cost possible, and to attend to and watch over the interests of the work, as a skilful owner would do for himself," is not a guaranty that the bricks shall be made in the best manner and at the least possible cost, without regard to the kind of materials and machinery furnished by B. *Talbot* v. *Heath*, 139.

3. A building contract between A. and B. provided that A. should do the work and find the materials, and B. should pay for laying the brick, and furnishing all necessary stock, except the brick, at $14.00 per thousand, measurement 24 brick per cubic foot, less $7.45 per thousand to be paid by B. for the brick and freight. *Held*, that a sale of the brick to A. was not contemplated by the terms of the contract; that the difference between these sums was the price to be paid A. for laying the brick and furnishing materials necessary therefor, estimating twenty-four bricks to a cubic foot, and not the actual number laid; and that parol evidence was not admissible in explanation of the intent of the parties. *Smith* v. *Emerson*, 169.

4. The plaintiff gave the defendant his promissory note, payable on demand, in consideration of the sale to him of five shares of stock in a railroad company, and on the same day the parties signed an agreement that the sale should be void, if the railroad should be sold under an execution then levied upon it, "or if the surrender of stock as now proposed and the settlement with the creditors according thereto, as now proposed and agreed, shall not be made within sixty days." At the time the note was given, an execution had been levied upon the property of the railroad company, and a plan had been partly carried out by which all the shares of stock were to be surrendered to trustees, who were to issue new stock to the creditors in payment of their debts. Within a month afterwards, the stockholders and the creditors had all signed agreements to carry out this plan, and the interest on the debts had been reckoned and the new stock issued; but the new stock was not actually delivered and the creditors paid until after the expiration of the sixty days. *Held*, that the contingency by which the sale was to become void had not happened; and that an action could be maintained on the note. *Osborn* v. *Jernegan*, 362.

See ACTION, 1; EVIDENCE, 10; INSURANCE, 8.

V. *Performance and Breach.*

5. In an action by the purchaser of real estate at a sale by auction to recover back the part of the purchase money paid at the sale the judge, who tried

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the case without a jury, ordered judgment for the plaintiff, and allowed a bill of exceptions, which stated that after the sale, and before the tender of the deed, some person had injured the estate by unhinging and breaking one of the blinds, breaking two panes of glass in a window, making a hole in the ceiling of one room, breaking through an inner door, and carrying away a piece of water-pipe five or six feet long; that the defendant offered to repair the injuries or to compensate the plaintiff for them; and that the judge refused to rule, as requested by the defendant, that these facts did not constitute in law a breach of the contract on the part of the vendor such as would release the purchaser from his obligation, and entitle him to recover back the part of the purchase money already paid. *Held*, that the exceptions did not disclose the nature and degree of the injuries to the property with sufficient fulness and distinctness to enable the court to determine that the refusal to rule as requested was erroneous. *Linton* v. *Hichborn*, 30.

6. A valid attachment for a substantial amount, placed on the estate of a vendor of land, after the sale and before the tender of the deed, is such an incumbrance as, in a court of law, justifies the purchaser in refusing to accept the deed, and in recovering back the part of the purchase money already paid, where the conditions of sale provide that the deed is to be ready "on or before fifteen days, or as soon as the papers can be completed, from the day of sale." *Linton* v. *Hichborn*, 32.

7. In an action upon an order alleged to be drawn on the defendant by A., payable to the plaintiff and accepted by the defendant, it appeared that B. contracted for the building of a church for a religious society; that the defendant agreed with B. to furnish the mason work and materials, and A. contracted with the defendant for the performance of part of the work; that, during the work, the tower of the church was found to be defective, and the society caused it to be partly taken down, and took possession and disposed of the materials; that the tower has since remained in the condition in which it was then left, except that, on finishing the church for occupancy, it was roofed over; that the order sued on was drawn on the defendant by A., payable "from percentage retained on work" upon the church, and accepted by the defendant payable "when the work is accepted by the church;" that, before the acceptance of the order, the completion of the tower had been abandoned by the mutual consent of all parties; and no steps, after the discovery of the defect, were taken by either the contractors or the society for further work upon it; that the society contended that the work on the tower was not done according to the contract, and, on that account, withheld from B. several thousand dollars, who in turn withheld the same from the defendant, out of the amount due by the terms of the contract; and that, when the defect was discovered, it was in dispute between the parties whether it was caused by poor materials, improper workmanship, or a defect in the plan. The plaintiff offered evidence tending to show that the defect was in the plan; and that the work and materials were in accordance with the plan and specifications, which were approved by the architect and superintendent, and such as were required by the terms of the contract. It further appeared that, after the abandon-

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ment of the work on the tower, the rest of the church was completed by B., who was paid therefor in full, excepting the amount withheld; that the society then took possession of the church, and have had exclusive occupancy of it since; and that, when possession was taken, the officers of the society stated to B. that it was to be without prejudice to its rights in regard to the alleged defect, and this was assented to by B., who afterwards went into bankruptcy, and the claim of his estate against the society for the whole amount withheld on the contract was sold by his assignee, and purchased for a small sum for the benefit of the society. *Held*, upon the above evidence, that whether the plaintiff had shown such an acceptance of the work by the society as would entitle him to recover on the order, was a question of fact for the jury. *Gray* v. *James*, 111.

See PLEADING, 3; VARIANCE.

CONVERSION.

See BANKRUPT, 3; FRAUDULENT REPRESENTATION, 1; SURVEYOR OF HIGHWAYS; TENANT IN COMMON.

CORPORATION.

1. A subscription for shares in a corporation, authorized by law to lay assessments upon shares, and to sell the shares for the non-payment of such assessments, imposes no personal liability upon the subscriber to pay assessments, unless he has expressly promised to do so. *Katama Land Co.* v. *Jernegan*, 155.
2. A., with others, signed a paper, which recited that a certain corporation had been incorporated, the capital stock of which was fixed at $50,000, and by the terms of which the subscribers agreed with each other and with the corporation to take the number of shares affixed to their respective names, and to pay therefor $100 a share. Opposite A.'s name was a certain number of shares. The whole number of shares subscribed for exceeded $50,000. At a meeting called for the purpose of organization, a committee was appointed to report the names of the subscribers to the original capital stock of $50,000. The committee reported a list of names not including A.'s. The meeting then voted to increase the stock to $100,000, and that all the subscribers be admitted to the company with the rights and privileges of stockholders under the agreement. A. subsequently paid three assessments on his stock. *Held*, that an action against him on the original paper, for a subsequent assessment, could not be maintained, even if he knew of these votes before paying his assessments. *Ib.*

See CONTRACT, 4; EQUITY, 5, 8; INFORMATION; MASTER AND SERVANT, 2–4; MONEY HAD AND RECEIVED, 1; PAYMENT.

COSTS.

1. Two persons sued together in tort, who sever in their answers, although they appear by the same attorney, are to be treated as separate parties, and each of them, if he prevails, is entitled to separate costs, except for money paid out for expenses by the two jointly; and, if the plaintiff appeals from

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the taxation of costs, and the defendants prevail upon the appeal, they are entitled also to the costs thereof. *O'Connell* v *Bryant*, 232.

2. Under the Gen. Sts. *c.* 112, § 13, authorizing this court to award double costs "if it appears that the exceptions are frivolous, immaterial, or intended for delay," the question whether that fact appears is for the court upon the bill of exceptions, without other evidence or argument by either party. *Blackington* v. *Johnson*, 21.

3. A person who applies to the Superior Court, under the St. of 1873, *c.* 261, for a jury to assess the damages occasioned by the taking of his land by a city, under the St. of 1875, *c.* 217, is under no obligation to enter into a recognizance for costs, and, if the jury award him a sum smaller than that previously awarded by the county commissioners, the city is not entitled to judgment for costs; and, on an appeal by the city from an order disallowing its motion for costs, if the order is affirmed, the costs of the appeal are to be taxed against the city. *Williams* v. *Taunton*, 287.

See BETTERMENT; VARIANCE.

COURTS.

See DISTRICT COURT; JUDGE; REPORT.

COVENANT.

See LEASE.

CRANBERRIES.

See FLOWING LAND.

DAMAGES.

The owner of a wharf and dock let them to a firm of which he was a partner, the firm paying a rent in proportion to the amount of business, and dividing the profits equally between the partners, after deducting charges and expenses, including such rent. A city emptied sewage into the dock, and thereby caused increased expenses to the firm in the transaction of its business. *Held*, on a bill in equity by the owner against the city, that such increased expenses could not be allowed the owner as damages, or considered as expenses of his estate. *Breed* v. *Lynn*, 367.

See CONTRACT, 3; COSTS, 3; MORTGAGE, 2-4; NUISANCE, 1, 2; WATERWORKS, 1, 4, 9; WAY, 2.

DEED.

1. A., purporting to act as agent of the proprietors of an academy, made a deed in which he was so named as grantor, conveying "the academy with the fence around said building." The deed contained personal covenants of warranty on the part of A., and was signed and sealed by him in his own name. *Held*, that the deed was the deed of A., that it conveyed the land about the building, and used in connection with it, as well as the building itself; and that the construction of the instrument was for the court. *Snow* v. *Orleans*, 453.

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2. If, when a deed of a person disseised is given, the grantee is in possession, or if the disseisor is then in possession and afterwards abandons it, and the grantee takes possession, the deed conveys a good title. *Snow* v. *Orleans*, 458.

3. This clause in a deed of land to a railroad corporation, "reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," operates as a reservation, and not as an exception, and vests in the grantor an estate for life only. *Ashcroft* v. *Eastern Railroad*, 196.

4. A deed of a lot of land described it as bounded on two sides by streets, on the third side by a passageway, and on the fourth side by another lot. The conveyance was subject to a condition that the front line of the building should be a certain distance from, and parallel to, one of the streets, which was named; and also a condition that no dwelling-house or other building except the necessary out-buildings should be erected on the rear of the lot. At the time the deed was executed there were certain buildings on the land, and the deed stated that the buildings then on the land conformed with the conditions. *Held*, that there was no ambiguity as to what portion was to be deemed the rear of the lot. *Keening* v. *Ayling*, 404.

5. A deed of a lot of land contained the condition that "no buildings which may be erected on said lot shall be less than three stories in height, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house for the term of twenty years" from a certain day. *Held*, that the limitation of time applied only to the mode of use and occupation; and not to the height of the buildings or the materials of the outer walls. *Ib.*

See Bond, 1; Easement, 2, 3; Evidence, 3; Tax, 2.

DEMAND.

See Husband and Wife, 2; Sale, 3.

DEMURRER.

See Autrefois Acquit or Convict, 3.

DEVIATION.

See Insurance, 7.

DEVISE AND LEGACY.

1. The will of a testator, whose wife and two daughters survived him, and whose real estate consisted of a parcel of land containing about 25,000 square feet, on which was a house, which he had long occupied as his home, contained the following provisions: "1. I give my wife all the furniture and house situated in B. 2. I give my wife one half of my other real and personal estate. 3. It is my desire that the other half should be divided equally between my two daughters. 4. I wish my wife and daughters to receive an income from all my real and personal estate during their natural lives after they have got their portions. 5. I wish

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my wife when she dies to give her property and money to my daughters. 6. It is my desire that my property of whatever kind should, after the decease of my wife and daughters, descend to the children of my daughters respectively if they are married." The wife of the testator never conveyed said real estate, or any part thereof, and, by her will, gave the residue of her estate, which included the land in question, to her two daughters equally. *Held*, that the devise in the first clause of the will of the testator was sufficient to convey a title in fee to the house and the land belonging to it; that, even if any portion of the land did not pass by this clause, the second and third clauses of the will would vest in the widow in fee one half of all his real estate not included in the first clause, and the other half in the two daughters of the testator, also in fee; that this fee was not qualified or rendered subject to a trust by the subsequent clauses of the will; and that the two daughters, by the will of their father and that of their mother, became owners in fee, as tenants in common, of the real estate. *Barrett* v. *Marsh*, 213.

2. A testatrix by her will directed her executor to sell by public auction "my house and land situated on L. Street, the proceeds thereof to be distributed as follows: To R., a former partner of my husband, the sum of two hundred dollars, provided that it can be proved that it was loaned to my said husband to be put into the first money paid for this house, my executor to decide whether it is or is not proved that the money was so given." The will then gave eleven legacies to different persons, using in each case the words, "I give and bequeath," or "I give," followed by this clause: "All these specific bequests of money, in the event of there not being enough to pay them all in full, each one is to be paid in proportion to the sum left to him, and the event of any surplus to be shared in like manner." The executor decided that the money was so lent by R. to the husband of the testatrix. *Held*, that the provision in favor of R. was not subject to abatement *pro rata* with the other bequests, but that he was entitled to be paid the sum of $200 in full out of the proceeds of the sale of the house. *McLean* v. *Robertson*, 537.

3. A testator left a widow, three sons, three married daughters, and one unmarried daughter then about seventeen years of age. By his will he gave to each of his married daughters legacies in money, and to his unmarried daughter a small sum of money and "a home and maintenance during the time she remains unmarried." To his widow he gave the use and income of all his real and personal estate during life, which consisted of about $2000 in personal property and three farms, on one of which was the homestead where the testator had always lived with his family. To one of his sons he gave nothing, he having received his full share, and to his other sons he gave the remainder of all his property real and personal in equal shares, upon the death of his wife, "they and each of them giving their personal services during my life and the life of their mother in cultivating the premises where I live to the best of their ability." The widow died three years after her husband. The unmarried daughter continued to reside and receive her maintenance at the homestead for four years after the testator's death, when she left on the ground that she was entitled

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to be maintained where she might choose to reside. *Held*, that the "home and maintenance" given by the will to the unmarried daughter was intended to be a home and maintenance on the premises where the testator lived at the time of his death; and that she was not entitled to be supported elsewhere. *Parker* v. *Parker*, 433.

See BANKRUPT, 1; EQUITY, 7.

DISSEISIN.

1. If, on a writ of entry, the tenant disclaims, evidence that the demanded premises were sold and conveyed by a collector of taxes to the tenant for non-payment of taxes by the demandant, and the deed put on record; that no entry was ever made upon or possession taken of the premises by the collector, or by any one in behalf of the tenant, but that, after the sale, the premises continued to be occupied by persons holding of the demandant the same as before the sale; and that the tenant did not notify the demandant that he did not claim the premises until the disclaimer was filed, does not show such an interference with the demandant's possession of the premises as to amount to a disseisin. *Field* v. *Hawley*, 327.

2 On a writ of entry, brought in 1877, there was evidence that, in 1850, an academy building, which stood on the demanded premises, was repaired by a person who took charge of the academy as a teacher; that, in the following year, the amount expended by him was raised by a subscription divided into shares of a certain amount each, and the amount paid to him; that the shareholders then took possession of the building and maintained a school in it until 1857, the lot being used as a playground; that, in 1859, the shareholders sold the building, to be removed from the premises, and divided the proceeds; that from that time until 1864 the lot remained vacant, unfenced and unused; that in 1864, with money raised by the contributions of neighbors and former pupils, for the purpose, as declared in the subscription paper, of preserving the place for the benefit of the town, the lot was fenced and planted with trees; that after this until 1877, when the town erected a library building thereon, the lot was kept in repair by the demandant and others, some of whom were the shareholders above referred to; that in 1877, prior to the date of the writ, the demandant procured deeds from some of the shareholders, which deeds were delivered on the land; and that he so acquired a majority of the shares. *Held*, that there was sufficient evidence to warrant a finding that the demandant had not acquired a title by disseisin. *Held*, *also*, that the subscription paper of 1864, being signed by the demandant's grantors, among others, was admissible to show that they did not claim title to the land at that time. *Held*, *also*, that evidence that a person not a subscriber to the subscription paper asked the demandant's permission to make the contemplated improvements was inadmissible in favor of the demandant. *Snow* v. *Orleans*, 453.

DISTRICT COURT.

Under the St. of 1874, *c.* 293, § 5, a warrant issued by a special justice of the First District Court of Bristol, under his own hand and seal, and return-

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able to that court, is valid, notwithstanding that, by § 14, the court is given power to establish a seal and to issue all writs and processes. *Commonwealth* v. *Walcott*, 238.

See EVIDENCE, 1; JUSTICE OF THE PEACE.

DIVORCE.

1. Evidence that a husband had been grossly intoxicated as often as three or four times a year for a period of twelve or fifteen years, and remained in that condition from seven to ten days on each occasion; that at such times he went or was sent to an asylum for inebriates; that when the desire for drink came upon him he could not resist; that a single glass of liquor would bring on excessive drinking and a renewal of gross intoxication; that there had been no apparent improvement in his habits in this respect; and that any undue excitement made him drink, is sufficient to justify a finding that he had contracted such gross and confirmed habits of intoxication as entitled the wife to a divorce, under the St. of 1870, *c.* 404. *Blaney* v. *Blaney*, 205.
2. At the trial of a libel for divorce by a husband against his wife alleging impotency on the part of the wife, it appeared that the parties had occupied the same bed for a period of ten years, both being in good health; that the marriage had never been consummated by any act of sexual intercourse; that the husband had often tried to have intercourse with his wife, but she utterly refused to permit it, giving no reason for her refusal; that the husband did not know that the wife was physically incapable of the act of sexual intercourse; and that the wife refused to submit to an examination as to her physical capacity. A female witness testified that the wife had said to her that she "could not have connection with any man," but gave no reason or explanation why she could not. *Held*, that this statement of the wife, taken together with the other evidence, would justify a finding that the charge in the libel was proved; and that a ruling that the evidence would not, in law, justify such a finding was a subject of exception. *Merrill* v. *Merrill*, 228.

DOMICIL.

See EVIDENCE, 14, 15; TAX, 1.

DONATIO CAUSA MORTIS.

See CONTRACT, 1.

DRAIN.

See SEWER.

DRUNKENNESS.

See DIVORCE, 1.

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EASEMENT.

1. In an action of tort against a city for breaking and entering the plaintiff's close in 1877, and removing a fence therefrom, the plaintiff claimed title by adverse possession, and put in evidence that he enclosed the land with a fence in 1855, and maintained the fence until the trespass complained of. The defendant's evidence tended to show that, for a period of more than twenty years, down to 1855, the land was unenclosed, openly used by the public and reputed to be a part of the common; and that in 1869 the superintendent of streets removed the fence. The defendant requested the judge to rule that the fact that the land was left open and unenclosed, and was used by the public for a period of twenty years, was sufficient to create an easement in it, either for the public or for the city, and, so long as such easement existed, the defendant would have the right to remove any obstruction to it. *Held*, that this instruction should have been given. *Gordon* v. *Taunton*, 349.

2. If a person owning a lot of land fronting on a highway conveys the rear part of the lot, which is surrounded entirely by the land of persons other than the grantee, the latter has a right of way by necessity to the highway, over the remaining land of the grantor; but the mere fact that the grantor had for a long time used a particular route to the rear land will not justify the implication that he intended to convey a right to this way, and exclude him from assigning any other practical and convenient way to the highway *Bass* v. *Edwards*, 445.

3. If a grantee has a way by necessity over the remaining land of his grantor, and a particular way to the land conveyed has been so used by the grantor before the conveyance, and by the grantee after it, as to amount to a designation of this way as a convenient one, yet, if the grantor obstructs this way, the grantee may go over other parts of the land of the grantor. *Ib.*

EMBEZZLEMENT.

An indictment charged A. with the embezzlement of treasury notes and national bank bills. The evidence showed that A. was entrusted by his employer with a bank check payable to bearer, for the purpose of paying a note, without any direction whether to pay the note with the check or to draw the money on the check and then pay the note; that generally notes were paid with checks, but the practice was not uniform; that while the check was in A.'s possession he made up his mind to take his employer's funds in his possession and use them; and drew the money on the check. *Held*, that whether there was a variance was a question for the jury. *Commonwealth* v. *Gateley*, 52.

EMINENT DOMAIN.

1. A person, whose land is laid out under the St. of 1869, *c.* 237, by the selectmen of a town, as a gravel and clay pit, cannot, after claiming and accepting his indemnity in the manner pointed out in the statute, insist upon any informality in the proceedings laying out the land. *Hatch* v. *Hawkes*, 177.

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2. Under the St. of 1869, c. 237, § 1, authorizing cities and towns to lay out lots of land as "gravel and clay pits," and the taking therefrom of "earth and gravel necessary to be used in the construction, repair or improvement of the streets and ways," any earth, gravel or stones, suitable for the purpose mentioned, and capable of being dug out of the ground and removed by ordinary excavation, may be taken. *Hatch* v. *Hawkes*, 177.

See COSTS, 8; EQUITY, 9; JUDGMENT, 2; MORTGAGE, 2–4; NUISANCE, 1, 2; WATERWORKS.

EQUITY.

I. *Jurisdiction and General Principles.*

1. A trust estate, which has been sold for non-payment of taxes, will not be ordered by this court, on a bill in equity under the Gen. Sts. c. 100, § 16, to be sold free from the tax title. *Dewey* v. *Donovan*, 335.

2. If a person, by false and fraudulent representations as to the extent of his business, induces another to enter into partnership with him for a definite period, a court of equity has jurisdiction to order the partnership articles to be cancelled, and to restrain the former from using the name of the latter as a partner; and, having obtained jurisdiction for that purpose, may administer complete relief in the same suit by ordering the former to pay the sums advanced or expended by the latter on account of the partnership. *Smith* v. *Everett*, 304.

3. B., a member of a firm, of which he and A. were partners, fraudulently made a promissory note in the name of the firm, and delivered it to C., who had knowledge of the fraud. The firm was afterwards dissolved and a receiver appointed. A., after the note became due, and while it was still in the hands of C., no suit having been begun on it, brought a bill in equity against B. and C., the prayer of which was that C. might be ordered to produce and cancel the note and be restrained from enforcing it. *Held*, that the bill could be maintained. *Fuller* v. *Percival*, 381.

4. B., a member of a firm, of which he and A. were partners, fraudulently made a promissory note in the name of the firm, and delivered it to C., who had knowledge of the fraud. C. delivered it to D., an innocent holder for value. The firm was afterwards dissolved and a receiver appointed. D. brought an action at law upon the note. A. then brought a bill in equity against B. and C., the prayer of which was that C. might be ordered to pay, take up and cancel the note, and be restrained from enforcing it. *Held*, that the bill could not be maintained. *Ib.*

5. A certificate of shares in the capital stock of a corporation was taken without the owner's knowledge, and, together with a forged power of attorney, delivered to a broker for sale. The broker employed an auctioneer, who sold the stock to a purchaser. The broker then sent the stolen certificate with the forged power of attorney to the corporation, requesting a new certificate in the name of the auctioneer. The corporation complied with the request, and the new certificate was sent to the auctioneer, who delivered it to the broker with a power of attorney, who in turn delivered it to the purchaser, to whom the corporation afterwards issued a new certificate.

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The broker, the auctioneer, the purchaser and the corporation acted in good faith, and supposed the forged power of attorney to be genuine. The original owner then brought a bill in equity against the corporation, and obtained a decree ordering it to procure and transfer to the plaintiff the shares of stock, and to make and deliver a certificate of the same. The corporation thereupon issued a certificate for the shares in question, and thereby increased its capital stock. It then brought a bill in equity against the broker, the auctioneer and the purchaser, setting forth the above facts. *Held*, that the bill could not be maintained. *Machinists' National Bank* v. *Field*, 345.

See ATTACHMENT; DAMAGES; MORTGAGE, 1; TRUST AND TRUSTEES, 1.

II. *Pleading and Practice.*

6. A person who has purchased an estate subject to a mortgage given by a former owner to a bank, cannot maintain a bill in equity against the receivers of the bank to procure a cancellation of the mortgage, on the ground that it was obtained by the false and fraudulent representations of the bank, but, if he has any remedy in equity, must proceed by a petition in the cause in which the receivers were appointed. *Porter* v. *Kingman*, 141.

7. A testator by his will left a sum of money to a town, the principal of which was to be managed by a board of trustees named in the will and their successors in office, all of whom, except one, were to be chosen by the remaining members of the board, and he was to be chosen by the town. The income of the fund was to be applied to the support of a high school for the benefit of the youth of the town, under the superintendence of the trustees, the town having the right to examine into the state of the school, and of the fund, and of the doings of the trustees. An information in equity, filed by the Attorney General, at the relation of a committee appointed by the town, against one of the trustees, alleged that he had been appointed treasurer by the other trustees, and had acted as such for several years; that, on another trustee being appointed treasurer, the defendant refused to pay a part of the funds to the new treasurer, and refused to make known to the board the amount in his hands, or the manner of investment, and to apply any part of it to the purposes of the trust. *Held*, on demurrer, that a failure to make "due application of funds given to public charities," within the Gen. Sts. *c.* 14, § 20, was sufficiently alleged; but that all the other trustees from the beginning of the trust, and, *it seems*, the town, should have been made parties defendant. *Attorney General* v. *Parker*, 216.

8. If a corporation issues a certificate of shares in its capital stock, upon the surrender of a former certificate for the same, accompanied by a transfer under a forged power of attorney, neither the person acting under such power, nor the person to whom the certificate is issued, is a necessary party to a bill in equity by the true owner against the corporation to compel it to procure a like number of shares of its capital stock, to record and issue to him a certificate thereof, and to pay him the dividends thereon. *Pratt* v. *Boston & Albany Railroad*, 443.

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9. A bill in equity, brought by the owner of a wharf and dock, in a harbor, to restrain a city from discharging sewage through a common sewer into his dock, and praying that the city be required either to discontinue the use of the sewer, or to make such change in its construction as to cause it to discharge into the harbor at some other place, was referred to a master to hear the parties and report the form of a final decree, with specific directions to report whether a peremptory injunction should be granted, and whether, and by what other means or scheme, the injury to the plaintiff's estate might be remedied. *Held*, that the master should report upon such means and schemes, proposed by the defendant, although they involved the exercise of the right of eminent domain on the part of the city. *Breed* v. *Lynn*, 367.

ERROR.

A formal error in an indictment is cured by verdict and judgment thereon, and cannot be availed of on a writ of error. *Pettes* v. *Commonwealth*, 242.

ESTOPPEL.

See BOND, 4; JUDGMENT, 4.

EVIDENCE.

1. If a complaint is made to J. S., a justice of the peace, and a warrant is issued by J. S. as such justice, returnable to a district court, and certified by "J. S., clerk" of that court, this court is not bound to take judicial notice of the fact that J. S., who received the complaint, was clerk of such district court. *Commonwealth* v. *Fay*, 235.

2. In an action for goods sold and delivered, to which the defence is infancy, the defendant may testify that he was sixteen years of age at the time of the sale. *Hill* v. *Eldridge*, 234.

3. On the issue whether a deed to a town of a lot of land, conveyed on condition that a library building should be erected upon it, had been delivered to, and accepted by, the town, there was evidence that the deed after being signed was left with the grantor; that it was acknowledged by him about a month afterwards, and recorded twelve days after the acknowledgment; that the town voted to erect the building on the land, and a building committee, appointed by the town, soon after began and have since completed the library building. *Held*, that the evidence was sufficient to warrant a finding that the deed had been so delivered and accepted. *Held*, *also*, that evidence that the deed was found in the grantor's house, after his death, and that the selectmen of the town had no knowledge of any delivery, was not conclusive in law to overcome the other evidence. *Snow* v. *Orleans*, 453.

4. On the trial of an indictment for the malicious burning of a building on a certain day, it is competent for the government to show, on the question of the intent with which the defendant burned the building on that day, that the defendant set fire to the same building three days before. *Commonwealth* v. *Bradford*, 42.

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5. On the trial of an indictment for the malicious burning of a building, after it has appeared that the defendant had conveyed the building to his sons, subject to a mortgage made by him, they assuming to pay the mortgage note, evidence that, a month before the fire, the defendant suggested to an insurance broker that there should be an increase of insurance on the building, is admissible to show that he had a motive to commit the offence. *Commonwealth* v. *Bradford*, 42.

6. At the trial of an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement resorted to for prostitution and lewdness, a witness testified, against the defendant's objection, that he had a conversation on the piazza of the house in question, with a girl; that the defendant was also at the same time out of doors, and from fifteen to twenty feet distant from him and the girl; that the girl spoke very loud, and solicited him to have criminal intercourse with her in the house, and stated that the price would be a certain sum, a portion of which she was obliged to pay the defendant. The judge instructed the jury that it was for them to say, upon the evidence, whether the defendant heard the conversation; and that, if they did not find she heard it, they were to disregard the evidence, it being outside of the house. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Sliney*, 49.

7. On the trial of an indictment for procuring an abortion, there was evidence that cuts, wounds and bruises were found in the womb of the woman upon whom the operation was alleged to have been performed, indicating the forcible use of some instrument, and that the defendant had the opportunity to commit the crime. *Held*, that evidence that, five months before the time of the alleged operation, the defendant had in his possession an instrument which he described as well fitted to procure an abortion, was admissible. *Commonwealth* v. *Blair*, 40.

8. An expert, who has heard so much of the testimony of a previous witness as is material to the subject-matter of the inquiry, may be interrogated thereon. *Hand* v. *Brookline*, 324.

9. In an action for an injury caused by a leak in a joint in a water-pipe under ground, an expert may be asked what the condition of the pipe after the accident, as described by another witness, indicated as to the original construction of the joint; and whether pipe, situated as this was, could be affected by contraction and expansion from the time it was laid until the time of the accident. *Ib.*

10. In an action on a written contract for the purchase of a certain number of casks of a particular kind of black lead at a certain price per pound, oral evidence that the casks were to contain "pure lump lead" is inadmissible. *Keller* v. *Webb*, 393.

11. Under the Gen. Sts. *c.* 129, § 72, where a declaration contains two distinct counts, the allegations in one are not conclusive evidence against the plaintiff upon the trial of the other. *Blackington* v. *Johnson*, 21.

12. On the issue of fact whether a landlord or his tenant was to keep in repair a platform in front of a shop, evidence that, after an injury caused by a defect in the platform, the landlord repaired it, is competent as an

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admission that it was his duty to keep the platform in repair. *Readman* v. *Conway*, 374.

18. In an action for personal injuries occasioned by the defendant's bull, while being led through a street of a city, the jury may infer that the defendant knew what is common knowledge in regard to the propensities of such an animal; and testimony that the defendant, after the accident, said that it was careless in his servant to lead the bull in the manner in which he was led, may be considered by the jury as an admission that the bull needed to be kept under control, and that the care taken in driving him through the street was insufficient. *Linnehan* v. *Sampson*, 506.

14. On the issue whether a party to a suit had his domicil in a certain city on the first day of May, his declarations as to his residence in a letter by him to the assessors of the city, in reply to a circular sent to him by them; deeds in which he was grantor, describing him as of another place, one of which was to the city as grantee; his will, in which he was described as in the deeds; and the will of his father, in which he was so described, are all inadmissible in his favor. *Wright* v. *Boston*, 161.

15. On the issue whether a party to a suit had his domicil in a certain city on the first day of May, his declarations as to his residence, in a letter by him to the assessors of the city, in reply to a circular sent to him by them, deeds to him as grantee, in which he was described as of another town, and evidence that he and his son were accustomed to talk over and discuss the affairs of such other town, are all inadmissible in his favor; but deeds to him as grantee, describing him as resident in the city, are admissible against him. *Weld* v. *Boston*, 166.

16. If a servant of A. goes to a house to get possession of a chattel, which A. has the right to take in a peaceable manner, evidence that the owner of the house, immediately after the entrance of the servant, said to a third person, in the hearing of the servant, but not in his presence, that the servant had entered against his will and had pushed him aside, and that the servant, who was on his way up-stairs to get the chattel, said nothing in reply, is incompetent, as an admission of the truth of the charge, in an action against A. for such assault. *Drury* v. *Hervey*, 519.

17. On the trial of an indictment for the malicious burning of a building, the voluntary testimony of the defendant before a fire inquest, reduced to writing and signed by him, is admissible against him. *Commonwealth* v. *Bradford*, 42.

18. At the trial of a criminal case, if the government offers to prove a confession of the defendant, and the latter objects to its admission, on the ground that it was induced by offers of favor made to him by the officer who arrested him and had him in custody, and the officer is called by the government and denies that he made such offers of favor, and the defendant then offers evidence to prove that he did, it is the duty of the judge to hear such evidence before admitting the confession. *Commonwealth* v. *Culver*, 464.

19. If in a criminal case the defendant testifies, and the record of his prior conviction and sentence in another case is put in evidence to impeach him, such record is conclusive evidence of such conviction and sentence; and his testimony that he was innocent, and that the officer, who made the

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complaint in that case, afterwards told him that he was satisfied of his innocence, is immaterial. *Commonwealth* v. *Gallagher*, 54.

See ACTION, 1; APPEAL, 5; AUDITOR; BASTARDY PROCESS, 2; BOND, 1; CONTRACT, 3, 7; DISSEISIN, 2; DIVORCE; EXCEPTIONS, 3, 4; FALSE PRETENCES; FRAUDULENT REPRESENTATION, 1; GUARDIAN AND WARD; HOMICIDE; INSURANCE, 2, 6; INTOXICATING LIQUORS, 5–8, 10; JUDGMENT, 4; JUSTICE OF THE PEACE; MECHANIC'S LIEN, 3; MONEY HAD AND RECEIVED, 2; PLEADING, 3; PRINCIPAL AND AGENT; PROMISSORY NOTE, 1, 3; RAILROAD, 1, 3, 4, 6; TAX, 1; WILL.

EXCEPTIONS.

1. A question of pleading not raised at the trial is not open on exceptions in this court, although the bill of exceptions states that the pleadings may be referred to. *Bass* v. *Edwards*, 445.
2. No exception lies to the refusal to give a ruling based on facts not appearing in the bill of exceptions. *Salomon* v. *Hathaway*, 482.
3. In an action for an assault, if the defendant has been allowed to testify fully as to all that was said or done at the time, he has no ground of exception to the exclusion of questions put to him in such a form as to call for an opinion upon the question whether his act was justifiable. *Barts* v. *Morse*, 226.
4. The admission of additional evidence, offered by the government, after the defendant in a criminal case has put in his evidence, is not the subject of exception. *Commonwealth* v. *Blair*, 40.

See APPEAL, 2; CONTRACT, 5; DIVORCE, 2; EVIDENCE, 18; INSURANCE, 4; MONEY HAD AND RECEIVED, 2.

EXECUTION.

If a levy of an execution is made on the land of a debtor who is absent from or not a resident of this state, a statement in the return of the officer that one of the appraisers was appointed by a person "who claimed to act as the authorized agent of" the debtor is insufficient, although the return states that the officer had caused three disinterested and discreet men to be sworn as appraisers, and sets forth the residence of the debtor in another state, and that he had no attorney in this state to the knowledge of the officer. *Dewey* v. *Tobey*, 93.

See MONEY PAID.

EXECUTOR AND ADMINISTRATOR.

See JUDGMENT, 3; PROMISSORY NOTE, 2.

EXPERT.

See EVIDENCE, 8, 9.

FACTOR.

A factor, who receives consignments of goods under an agreement by which he is to advance to his principal money from time to time as the latter

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requires, to charge him interest on the advances at a certain rate, to sell the goods consigned at the market price, to charge a certain commission for selling, and, after deducting advances, interest and commission, to pay the balance to the principal, and if, upon settlement, after all the goods are sold, a balance is found due the factor, the principal is to pay it, may, after having made large advances to the principal on account of goods not sold, and which have been on hand for several months, sue the principal for the amount of the advances already made, without waiting until all the goods are sold. *Dolan* v. *Thompson*, 183.

FALSE PRETENCES.

A person, who by false and fraudulent representations obtains from another a sum of money which is no more than is rightfully due him from the latter, cannot be convicted of obtaining property by false pretences, under the Gen. Sts. *c.* 161, § 54; and, at the trial of an indictment against him on that statute, evidence of the amount of the debt to him is admissible. *Commonwealth* v. *McDuffy*, 467.

FIXTURE.

See MECHANIC'S LIEN, 1.

FLATS.

See ACTION, 3.

FLOWING LAND.

Under the St. of 1866, *c.* 206, allowing the owner of land appropriated to the cultivation of the cranberry, to erect and maintain a dam across any stream not navigable, for the purpose of flowing land, according to the provisions of the Gen. Sts. *c.* 149, "so far as the same are properly applicable," it is no objection to the recording of a verdict that the jury have awarded gross damages as well as annual damages. *Blackwell* v. *Phinney*, 458.

See MILL.

FORCIBLE ENTRY AND DETAINER.

A lessee, who has never been in possession of the premises, and who acquires title through a purchaser at a mortgagee's sale, neither the purchaser nor the mortgagee having ever been in possession, cannot maintain an action, on the Gen. Sts. *c.* 137, for forcible entry and detainer. *Woodside* v *Ridgeway*, 292.

FORGERY.

See EQUITY, 5; INDICTMENT, 1; VERDICT, 1.

FRAUD.

See BANKRUPT, 3; EQUITY, 3, 4; INFORMATION

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FRAUDULENT REPRESENTATION.

1. If a person, by false and fraudulent representations, induces another to exchange certain chattels for a parcel of land, of which he delivers an invalid deed, the grantee can recover for the conversion of the chattels; and the deed is admissible in evidence, without proving its execution by the attesting witness. *Skinner* v. *Brigham*, 132.

2. In an action for false and fraudulent representations, whereby the plaintiff was induced to buy an estate in another state, it appeared that the defendant made representations to the plaintiff in relation to the situation of the estate, and the condition and character of the buildings upon it; that, before the exchange of the deeds, the defendant told the plaintiff that he had never seen the estate; and that, after the exchange of the deeds, the plaintiff went for the first time to see the estate, and found that all of the representations made by the defendant were false. *Held*, that it was no defence that the defendant had not seen the estate; and that whether the plaintiff was negligent in not visiting the estate was a question for the jury. *Savage* v. *Stevens*, 207.

See EQUITY, 2.

GIFT.

See CONTRACT, 1.

GOODS SOLD AND DELIVERED

See EVIDENCE, 2.

GUARANTY.

1. In an action on an agreement of indemnity, it appeared that the plaintiff had been applied to by A. to negotiate a loan on a certificate of stock as collateral security; that he then applied to the defendant, who said he suspected that the certificate was not genuine, agreed to lend the money if it was genuine, requested the plaintiff to bring A. to the defendant's office, and made arrangements to have A. arrested there in case the certificate was not genuine. The defendant also requested the plaintiff, if A. would not come to the office, to draw his draft on the defendant for the amount of the loan, less the commission, payable to the order of A., and give the same to A. for the certificate, agreeing to hold the plaintiff harmless; and intending to have A. arrested if the certificate should not be genuine. A. refused to go to the defendant's office, and the plaintiff gave A. his draft and received the certificate, which proved to be forged; and the plaintiff was obliged to pay the draft. *Held*, that if the plaintiff acted in good faith, he could maintain the action. *Holway* v. *Fuller*, 188.

2. In an action on a guaranty, by which the defendant guaranteed to the plaintiff the payment "of all indebtedness which A. may incur for purchase of goods, wares and merchandise" from the plaintiff, it appeared that B. had delivered goods at various times to A., to be by him manufac-

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tured for and returned to B.; that B. was to pay A. for his services in manufacturing the goods; that A. did not return the goods, but converted them to his own use; that B. requested A. to return the goods, at the same time charging him with such conversion; that A. then requested B. to make a bill of the goods to the plaintiff, which he did, and the plaintiff then made a bill of the same to A.; and that this arrangement was made after the delivery of all the goods by B. to A. It was admitted by the plaintiff, that he had never had possession of the goods. *Held*, that the transaction was not a sale, within the meaning of the guaranty. *Hall* v. *Peyser*, 195.

See CONTRACT, 2.

GUARDIAN AND WARD.

A ward is not liable for repairs put upon his dwelling-house by a person employed by the guardian to make them, even after the death of the guardian; and evidence that the repairs were necessary is immaterial. *Wallis* v. *Bardwell*, 366.

HOMICIDE.

At the trial of an indictment for the murder of a woman, evidence that the defendant, who was her husband, caused her death by beating, stamping and jumping upon her person, and kicking her upon vital portions of her prostrate body, and that these acts were repeated at intervals during the day, by reason of which she suffered prolonged agony before death, will justify the jury in finding that the defendant was guilty of murder committed with extreme atrocity and cruelty, and consequently of murder in the first degree, under the Gen. Sts. *c.* 160, § 1. *Commonwealth* v. *Devlin*, 253.

HOUSE OF ILL FAME.

See EVIDENCE, 6.

HOUSE OF REPRESENTATIVES.

See CONSTITUTIONAL LAW, 1, 2; JUDGE.

HUSBAND AND WIFE.

1. A pension check payable to the order of A. was received by his attorney from the United States pension office, and indorsed by A. The attorney then took the check and went with A. and his wife to a savings bank, and deposited, with their consent, a part of the amount of the check in the name of the wife, and gave her the rest of the amount. *Held*, that the amount deposited remained the property of the husband, and was liable to attachment by his creditors. *Spelman* v. *Aldrich*, 113.
2. To secure a loan made by a wife to her husband of money which came to her before marriage, the husband, in 1875, executed a mortgage of personal property to A., to secure the payment of a promissory note of even date, signed by the husband, and payable to A. or order. On the same

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day, A. executed a deed on the back of the mortgage, assigning to the wife the mortgage deed, the note and claim thereby secured, and all his right, title and interest in the property mortgaged; but did not indorse the note. *Held*, that the wife, after a demand under the Gen. Sts. *c.* 123, § 63, could maintain an action against an officer, who attached the mortgaged property on a writ against the husband. *Held*, *also*, that she might properly, in her demand upon the officer, describe the sum due upon the note as due to her upon the mortgage. *Degnan* v. *Farr*, 297.

See INTOXICATING LIQUORS, 5; MARRIED WOMAN; MORTGAGE, 1.

IMPOUNDING OF CATTLE.

A person distraining cattle doing damage on his land impounded them in the town pound and handed the keeper the following written memorandum, with his name and a date upon the paper: "Two dollars for damages and three dollars and fifty cents for fees." *Held*, that the memorandum was defective in not stating the cause of impounding, as required by the Gen. Sts. *c.* 25, § 27; and that such person was a trespasser *ab initio*. *Newhouse* v. *Hatch*, 364.

INDICTMENT.

1. An indictment in the first count charged the defendant with the forging of a certain instrument, and in the second count charged another person with the uttering of the instrument, and then proceeded to charge the defendant with being an accessory before the fact to such uttering. *Held*, that the indictment contained but two counts. *Pettes* v. *Commonwealth*, 242.
2. An indictment for larceny described the property taken as "divers promissory notes payable to the bearer on demand, current as money in said Commonwealth, of the amount and of the value of eighty dollars, a more particular description of which is to the jurors unknown." *Held*, in the absence of evidence that the grand jury had a full description of the property taken, that an instruction, requested by the defendant, that, if the jury should find that the grand jury had a full description, they should acquit, was properly refused. *Commonwealth* v. *Gallagher*, 54.
3. On an indictment for larceny, it is not necessary to prove that the amount of the property stolen is not more than the amount alleged. *Ib.*
4. An indictment for the larceny of "divers promissory notes payable to the bearer on demand, current as money in said Commonwealth," is sustained by proof of stealing bank bills. *Ib.*
5. An indictment on the Gen. Sts. *c.* 160, § 24, charging the robbery of several "promissory notes then and there of the currency current in said Commonwealth," is sustained by proof that the notes stolen were either bank bills or treasury notes. *Commonwealth* v. *Griffiths*, 252.
6. In an indictment, the words "of the currency current in this Commonwealth" are equivalent to "current as money in this Commonwealth.' *Ib.*

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7. An indictment, on the St. of 1862, *c.* 168, § 1, alleging that the defendant printed and published obscene pictures of naked girls, is not sustained by proof that he printed and published obscene pictures of girls naked only above the waist. *Commonwealth* v. *Dejardin*, 46.

See APPEAL, 1; AUTREFOIS ACQUIT OR CONVICT, 2, 3; EMBEZZLEMENT; ERROR; INTOXICATING LIQUORS, 1; JOINDER OF ISSUE; MOTION TO QUASH; POLYGAMY; RAILROAD, 3, 4, 6; RECOGNIZANCE; VERDICT, 1

INFANT.

See COMPLAINT, 2; EVIDENCE, 2.

INFORMATION.

An information in the nature of a *quo warranto*, under the Gen. Sts. *c.* 145, §§ 16–24, without the intervention of the attorney general, will not lie against the stockholders of a corporation organized under the St. of 1870, *c.* 224, if the forms of law in the organization of the corporation have been complied with, and the certificate issued by the secretary of the Commonwealth, as provided by § 11, although the certificate was obtained by fraud. *Rice* v. *National Bank of the Commonwealth*, 300.

INSURANCE.

I. *Life.*

1. An application for life insurance was made to an insurance company, which it found satisfactory; and it wrote a policy based on the application and sent the policy to its agent, who offered the policy to the person making the application for inspection. The premium called for by the terms of the policy was not paid, and the policy was not delivered. *Held*, that an action could not be maintained against the company, under any form of declaration. *Markey* v. *Mutual Benefit Ins. Co.* 158.

II. *Fire.*

2. If, when a policy of insurance is issued, the person whom it purports to insure against loss has previously conveyed his interest in the property insured, the policy is void in his hands, and an assignment on the policy at the time it is issued of all his interest in the policy to the grantee, assented to by the insurance company, does not create a new and independent contract of insurance between the company and the grantee; and parol evidence is inadmissible to show that all the facts were communicated to the agent of the company, and that the assignment was drawn by the agent to make it, as he said, all right. *McCluskey* v. *Providence Washington Ins. Co.* 306.

3. A policy of insurance insured the plaintiff as follows: "$500 on brick pottery building and ells, three stories with basement and flat roof. $500 on machinery, shafting, belting, machines, tools and all implements used by him in his business. $950 on stock in trade consisting principally of

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earthen-ware and on materials for manufacturing the same. $50 on office furniture, including safe, contained in said building, situate on D. Street, near the F. Railroad in N." In an action thereon it appeared that the plaintiff was a manufacturer of earthen-ware in N.; that, at the date of the policy in suit and of the fire which occasioned the loss sued for, his manufactory consisted of two three-story brick buildings connected by a corridor; that one building was generally known as the pottery, and had three ells attached, one of which was used as the office; that the other building was generally known as the storehouse; that the pottery building contained the engines and most of the machinery, and was chiefly used for the manufacture of earthen-ware, though to some extent also for storage; that the storehouse building was chiefly used for storing manufactured ware, though certain of the processes of manufacture were conducted there, and a limited amount of machinery and implements was contained therein; that in the course of manufacture almost all the stock went to and fro from each of the buildings to the other several times; and that by the fire the storehouse and its contents were totally destroyed, and the pottery building injured to a certain extent, but its contents were not damaged by fire. *Held*, that the words of the policy "contained in said building, situate on D. Street," &c. applied to the machinery and stock, as well as to the furniture; and that nothing was covered by the policy but the "pottery building" and its contents. *Hews* v. *Atlas Ins. Co.* 389.

1. A policy of fire insurance on oil paintings, each valued at a certain sum, contained on its face an agreement that the representation given in the application for the insurance contained a true exposition of all the facts and circumstances in regard to the value of the property insured, and that, if any material fact or circumstance should not have been fairly represented, the policy should be void. The written application stated that the original of one of the paintings was by Leonardo da Vinci; that it was then in the Vatican or in one of the churches at Rome, under the care of the Pope, and could not be bought for $1,000,000; that the copy was the only one in America, and no other copy could ever be allowed by the Pope. In an action on the policy, the jury were instructed that the representations as to the origin and character of the painting were material to the risk, and if falsely and fraudulently made, and if relied on by the insurer, would avoid the policy. At the close of the charge, the defendant requested the judge to rule, that if the statements were in fact untrue, and the insurer relied on the truth of the statements, the plaintiff could not recover; that this was so, even if he believed the statements to be true; that the representations as to the origin and character of the picture were material to the risk; and, if not true, the policy was void. The judge gave the first two instructions, with the addition to each, "provided these statements were false and fraudulent;" and, in regard to the last, replied, "I have already given that." *Held*, that the plaintiff had no ground of exception. *Wood* v. *Firemen's Ins. Co.* 316.

5. If a policy of fire insurance contains a clause providing that any person other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured, the assured is bound by

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representations made by an insurance broker, who procures the insurance, notwithstanding the St. of 1861, *c.* 170. *Wood* v. *Firemen's Ins. Co.* 316.

6. On the question whether an oil painting was fraudulently overvalued in a policy of insurance, the insured cannot give in evidence offers for the picture made after the policy issued. *Ib.*

III. *Marine.*

7. A vessel was insured against perils of the seas "at and from Plymouth to Banks, cod-fishing, and at and thence back to Plymouth." The premium was to be at a certain rate per month, and the policy was to end with the voyage. The vessel sailed with the usual quantity of bait, but not with a full supply for the trip, it being customary to rely on catching live bait on the Banks. Such bait had been plenty in previous years, but this year was scarce; and the master, after exhausting the bait on hand, and being unable to catch any, went to the nearest practicable port for bait, returned to the fishing-grounds, and the vessel was afterwards lost by a peril insured against. *Held*, in the absence of evidence of a usage to put into port for bait, under such circumstances, that the doing so was a deviation which discharged the insurer. *Burgess* v. *Equitable Ins. Co.* 70.

INTEREST.

A., who had levied an execution on the property of a mining company in Colorado, and had bought the property when sold under the levy, and B., a creditor of the company, entered into an agreement in this Commonwealth, by the terms of which it was agreed that there was due A. a certain sum and interest; that A. should manage the property, and convey it to B. whenever he realized the amount of his demand "and interest as aforesaid," either from the property or from B. in liquidation of his 'aforesaid demand." *Held*, on a bill in equity by B. against A., for the conveyance of the property, that the defendant was entitled to interest on the principal sum to the date of the decree, and upon advances and payments made by him in managing the property; and that the rate of interest was to be governed by the law of this Commonwealth, although the property was to be managed in Colorado. *French* v. *French*, 360.

INTOXICATING LIQUORS.

1. An indictment on the St. of 1875, *c.* 99, charging the defendant in one count with "keeping an open bar," and in another count with "keeping a public bar for the sale of spirituous and intoxicating liquors," but not alleging that the defendant unlawfully sold intoxicating liquors or kept or exposed them for sale, does not sufficiently set forth the offence intended to be charged. *Commonwealth* v. *Hickey*, 250.

2. Under the St. of 1875, *c.* 99, § 1, which enacts that "no person shall sell, or expose or keep for sale, spirituous or intoxicating liquors, except as

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authorized in this act," a complaint, which merely alleges that the defendant "unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same within this Commonwealth," is insufficient. *Commonwealth* v. *Byrnes*, 248.

3. The board of police commissioners of the city of Boston, being vested by the St. of 1878, *c.* 244, with all the powers given to the mayor and aldermen by the St. of 1875, *c.* 99, an order of the board of police commissioners of the city of Boston, under the St. of 1878, *c.* 244, by which the police officers of the city are "specially appointed and authorized" to enter at any time upon the premises of any person licensed to sell intoxicating liquors under the St. of 1875, *c.* 99, to ascertain the manner in which such person conducts his business, and to preserve order, is legal and valid. *Commonwealth* v. *Ducey*, 269.

4. A certificate of license for the sale of intoxicating liquors, granted by the mayor and aldermen of a city, recited that it was granted and accepted upon the express condition that the licensee should in all respects fulfil and conform to all the conditions or requirements of the St. of 1875, *c.* 99; and that, for breach of any of its conditions or requirements, the license should become forfeited, null and void. It was signed by the mayor and city clerk, and below their signatures followed an "extract from chapter 99 of acts of 1875," section six being quoted in full. *Held*, that the license was substantially in the form required by the statute; and that the licensee, having fully complied with the conditions of the license, and having displayed it on his premises according to law, was legally licensed. *Murphy* v. *Nolan*, 542.

5. If a married woman keeps intoxicating liquors for sale in violation of law in a hotel hired by her, and her husband aids her in such keeping, or if, without actually and actively aiding her, he is present, and has knowledge of the fact and of her intent, the presumption of law is that she is acting under his coercion, and he can be convicted of such illegal keeping. *Commonwealth* v. *Pratt*, 462.

6. At the trial of a complaint on the St. of 1875, *c.* 99, for the illegal keeping of intoxicating liquors, with intent unlawfully to sell the same, there was evidence that in the defendant's dwelling-house, where he kept boarders, were a barrel of ale on tap, several bottles containing liquor, an ale-pump, tumblers, a strainer, bowls and dishes; and that in a shed adjoining the house there was an empty ale-barrel. *Held*, that this evidence was sufficient to warrant a verdict of guilty. *Commonwealth* v. *Levy*, 240.

7. A complaint on the Gen. Sts. *c.* 87, § 6, charging the defendant with keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, is sustained by proof that the defendant furnished intoxicating liquors with meals supplied to customers, the payment for which included payment for the liquors. *Commonwealth* v. *Worcester*, 256.

8. At the trial of a complaint on the Gen. Sts. *c.* 87, §§ 6, 7, charging the defendant with keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence that the

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defendant lived in the building and occupied the second and third stories, the first floor being used as a bar-room; that the bar-room had one entrance from the street and the upper part of the building another, there being an inside door at the foot of the stairs, leading into the bar-room, so that it was possible to go from the rooms occupied by the defendant to the bar-room without going into the street; that on Sundays a curtain was lowered at one of the bar-room windows exhibiting the inscription "dining-rooms," preceded by the surname of the defendant; that the bar-room was not fitted up as a dining-room. *Held*, in the absence of evidence that any other person bearing the same surname as the defendant had anything to do with the premises, that the evidence was sufficient to justify the jury in finding that the defendant was the proprietor of the place in question. *Commonwealth* v. *Sisson*, 48.

9. At the trial of an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence that the defendant occupied a building, using part of it for a dwelling and the rest for other purposes; that, during part of the time covered by the indictment, he used one room for the sale of liquors, and during the rest of the time another room adjoining the first. The judge declined to rule that the government must elect as to which tenement or room it would rely upon; and instructed the jury that a tenement might consist of two rooms used together and immediately connected together, and that, if the two were thus used alternately and interchangeably for the illegal sale or the illegal keeping of intoxicating liquors, they might be considered as parts of one and the same tenement, and the illegal use of either, while thus connected and used, would be an illegal use of the tenement. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Fraher*, 56.

10. At the trial of an indictment on the Gen. Sts. *c.* 87, §§ 6, 7, charging the defendant with keeping and maintaining a certain tenement used for the illegal sale and illegal keeping of intoxicating liquors, there was evidence tending to show that there were two seizures of intoxicating liquors made during the time covered by the indictment; and that these liquors, at the time of seizure, were in places where they were not likely to be seen by persons visiting the premises. The judge declined to rule that if the liquors seized were not offered by exposing them to those who might become purchasers, and that if the liquors were deposited where their presence could not be known to the public, the jury could not find upon such state of facts alone an illegal keeping, although the defendant did keep and intend to sell them; and ruled that, if the liquors were kept in the tenement, and at the time to which the evidence related, for the purpose of being sold when occasion or opportunity offered, the defendant might be convicted. *Held*, that the defendant had no ground of exception. *Ib.*

See Appeal, 5; Autrefois Acquit or Convict, 1, 2; Constitutional Law, 3.

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JOINDER OF ISSUE.

The omission of the record in a criminal case to show a joinder in a demurrer to an indictment is immaterial, and cannot be objected to after the trial and determination of the issue tendered by the defendant. *Commonwealth* v. *McCormack*, 258.

JUDGE.

The question whether a bill or resolve appropriating money from the Treasury of the Commonwealth is a money bill, which must, by the Constitution, *c.* 1, sect. 3, art. 7, originate in the House of Representatives, is a question upon which the two branches of the Legislature are authorized by the Constitution, *c.* 3, art. 2, to require the opinion of the Justices of the Supreme Judicial Court. *Opinion of Justices*, 557.

JUDGMENT.

1. A judgment by consent for the defendant, after a plea in abatement has been filed and sustained, and without further answer or trial, is no adjudication of the merits. *Jordan* v. *Siefert*, 25.

2. Where the Probate Court has jurisdiction to appoint a trustee under the Gen. Sts. *c.* 43, §§ 17, 18, to recover the damages sustained by persons having separate interests in land taken for a highway, the regularity of its proceedings in the appointment of the trustee cannot be impeached in an action by the trustee against the city taking the land. *Boston* v. *Robbins*, 384.

3. After a decree of distribution of an intestate estate in the Probate Court, ordering A., the administrator, to pay a certain amount to B. as administrator of C., and his neglect to obey the order, a surety on A.'s bond, in an action against him thereon for the benefit of B. on account of such neglect, will not be allowed to show that B. was not duly appointed administrator of C. *White* v. *Weatherbee*, 450.

4. A. and B. entered into an agreement, by the terms of which B. was to put up certain works on the land of A., and guaranteed that they would be capable of producing certain results, and A. was to pay a certain price therefor. A. subsequently brought an action against B. on the agreement, alleging the non-performance of the agreement, and the abandonment of the work by B. in an incomplete state; that A. had advanced certain sums of money to B. during the progress of the work; and claiming to recover these sums and other damages. B. filed an answer containing a general denial; and also brought an action against A. on the agreement, alleging full performance on his part, and claiming to recover the price agreed upon for the work. The two cases were tried together, and the jury returned a verdict for A. for the sums advanced to B., and, in the other case, a verdict for the full amount claimed by him. This last verdict was set aside. *Held*, on a new trial of the action of B. against A., that the judgment in favor of A. in the other case estopped B. to prove performance of the contract on his part; and that evidence was inadmissible to show that the issue

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of performance was not submitted to the jury in that case. *Butler* v. *Suffolk Glass Co.* 512.

In an action upon a judgment recovered against the defendant in another state, he may plead and prove, notwithstanding any recitals in the record thereof, that he was not duly served with process, and did not authorize an attorney to appear for him, in the action in which the judgment was rendered; and an attachment and levy of execution upon the defendant's property in the state in which the judgment was recovered will not make the judgment binding upon him personally. *Gilman* v. *Gilman*, 26.

See SURVEYOR OF HIGHWAYS, 2; WATERWORKS, 1.

JURISDICTION.

See JUSTICE OF THE PEACE.

JURY.

See BETTERMENT.

JUSTICE OF THE PEACE.

Since the St. of 1877, *c.* 211, providing that no justice of the peace shall receive a complaint and issue a warrant in a criminal case, unless he is commissioned as a trial justice, or holds the office of clerk or assistant clerk of a municipal, district or police court, the fact that the justice holds the additional office cannot be proved by extrinsic evidence, but must appear on the face of the papers, and if it does not so appear, it is a defect in the jurisdiction of the court which may be availed of by motion in arrest of judgment, under the St. of 1864, *c.* 250, §§ 2, 3. *Commonwealth* v. *Fay*, 235.

LAND DAMAGES.

See COSTS, 8; MORTGAGE, 2–4; NUISANCE, 1, 2; WATERWORKS, 1, 4, 9; WAY, 2.

LANDLORD AND TENANT.

1. A tenant at will, under an agreement that he is at liberty to leave the premises at pleasure and at a moment's notice, is not liable for rent after he has given such notice, and is not obliged to give the notice mentioned in the Gen. Sts. *c.* 90, § 31. *Davis* v. *Murphy*, 143.
2. If a lessee has obtained peaceable entry and possession of a building previously occupied as a grocery by a tenant at will of the lessor, and any notice to the tenant is necessary, two days is a reasonable time for such notice, in the absence of evidence to the contrary. *Arnold* v. *Nash*, 397.
3. The owner of a lot of land abutting on a highway, on which is a building consisting of three shops, and having a wooden platform extending from it to the sidewalk, with no barriers separating the parts of the platform in front of the several shops from each other, and which is constructed for

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the common use of all the shops and used by the public as a common passageway thereto, is liable to a person who, in the exercise of due care, is injured by a defect in the platform, in the absence of an agreement by the tenants of the shops to keep it in repair. *Readman* v. *Conway*, 374.

See ACTION, 2; EVIDENCE, 12.

LARCENY.

See INDICTMENT, 2–4.

LAW AND FACT.

See CONTRACT, 7; EMBEZZLEMENT; NEGLIGENCE; SALE, 2, 3.

LEASE.

1. The assignment of a lease by the lessor entitles the assignee to sue the lessee in his own name on the covenants in the lease; and an assignment by the lessee of his right, title and interest in the lease does not exempt him from liability on his covenant to pay rent, although the assignee of the lessor assents to the latter assignment. *Pfaff* v. *Golden*, 402.
2. A lease of a shop provided that the lessee should pay a certain rent, except in case of fire, and should keep the premises in repair, damage by fire excepted; that in case the demised premises should be damaged by fire, so as to be rendered unfit for use and habitation, the rent, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, should be abated or suspended, until the premises should be put in proper condition for use and habitation by the lessor. During the term of the lease, the shop was injured by fire, so as to be unfit for use; the lessor did not repair for a certain time, refused to abate the rent, and demanded full rent of the lessee, which he paid under protest. *Held*, that the lessee had no cause of action against the lessor. *Regan* v. *Baldwin*, 485.

See FORCIBLE ENTRY AND DETAINER; RENT; TRUST AND TRUSTEE, 2, WAY, 2.

LEGACY.

See DEVISE AND LEGACY.

LICENSE.

See INTOXICATING LIQUORS, 4.

LIEN.

A hack, described as in use at certain stables, was mortgaged, and, by the terms of the mortgage, the mortgagor was to retain possession, and use and enjoy the same until default. While so in possession, the mortgagor had it repaired. *Held*, that the person making the repairs had a lien therefor as against the mortgagee. *Hammond* v. *Danielson*, 294.

See MECHANIC'S LIEN; MORTGAGE, 4.

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LIMITATIONS, STATUTE OF.

The following instrument, signed in the presence of an attesting witness, "On demand with interest please pay J. S. or order fifty-five dollars," is a witnessed promissory note, within the statute of limitations, Gen. Sts c. 155, § 4. *Almy* v. *Winslow*, 342.

MALPRACTICE.

See ACTION, 1; ATTORNEY AND COUNSEL.

MANDAMUS.

The duties of a board of examiners of election returns, under the Gen. Sts. c. 7, § 25, are purely ministerial, and the board cannot receive or consider evidence of extrinsic circumstances, but is confined to the records of votes returned and laid before it; and mandamus will not lie to compel the board to count certain votes, containing the initial letter only of the Christian name of a candidate, with other votes containing his name in full. *Clark* v. *Board of Examiners*, 282.

MANUFACTURING CORPORATION.

See MASTER AND SERVANT, 2–4.

MARRIED WOMAN.

1. A married woman, who owns a farm and carries it on for the support of her family or her husband's family, is engaged in a "business on her separate account," within the St. of 1862, c. 198, § 1; and, if she fails to file the certificate required by that statute, her personal property used in such business is liable to attachment by the creditors of her husband; and it is immaterial that the produce of the farm is mainly used in the support of her family. *Snow* v. *Sheldon*, 332.
2. If a married woman carries on the business of keeping a boarding-house, and neglects to file the certificate required by the St. of 1862, c. 198, § 1, debts due to her for board are liable to attachment by the creditors of her husband. *Harnden* v. *Gould*, 411.
3. The St. of 1862, c. 198, is not repealed by implication by the St. of 1874, c. 184. *Ib.*

See HUSBAND AND WIFE; INTOXICATING LIQUORS, 5; MORTGAGE, 1.

MASTER AND SERVANT.

1. A person employed and paid by a contractor as driver of a horse and wagon, which, together with the driver, the contractor lets by the day to a city to be used in the work of paving a street, and who has the entire management of the horse as to the manner of driving him, and whose duty it is to see that he is properly shod, is the servant of the contractor in so driving the horse and having him shod, and, for an injury to a third person caused by his negligence in these respects, the contractor is liable. *Huff* v. *Ford*, 24.

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2. In an action by an employee against a manufacturing corporation, for personal injuries received while endeavoring to escape from its mill, which was on fire, it appeared that the fire was caused by the heating of a bearing in one of the machines used in the mill, and that it might have been readily extinguished when first discovered; that the defendant had a cistern, with pipes leading to each story of the mill, to which were attached lines of hose, but at the time of the fire the water did not run when attempted to be used. *Held*, in the absence of evidence of any reason why the water did not run, that it must be attributed to the negligence of the fellow-servants of the plaintiff in failing to keep the apparatus in order, or in failing to put it in operation; and that the defendant was not liable. *Jones* v. *Granite Mills*, 84.

3. If a manufacturing corporation has a mill properly constructed for its ordinary business, it is not, in the absence of a statutory requirement, responsible to an employee for not providing a means of escape from a fire, which is not caused by the negligence of the corporation. *Ib.*

4. In an action by an employee, between twenty and twenty-one years of age, against a manufacturing corporation, for personal injuries received while endeavoring to escape from its mill, which was on fire, the plaintiff requested the judge to instruct the jury that it was the duty of the defendant to provide proper and suitable means of extinguishing fire, proper and suitable ways and means of escape, and of giving alarm to its servants in case of fire. The judge instructed the jury, that if the room in which the plaintiff was at work was a suitable place, and there were proper and suitable means of extinguishing fire, and the means of egress and escape were suitable and proper, and in order and ready for use, the plaintiff could not recover. *Held*, that the instructions as applied to the first and second requests were sufficiently favorable to the plaintiff; and that the third request for instructions was properly refused. *Keith* v. *Granite Mills*, 90.

MASTER IN CHANCERY.

See EQUITY, 9.

MAXIM.

Caveat emptor. See *Hight* v. *Bacon*, 10, 12.

MECHANIC'S LIEN.

1. A boiler, situated in a building joined to a mill, and used to supply steam to the mill, is a part of the realty, and for repairs on the boiler a lien can be maintained under the Gen. Sts. *c.* 150; and the whole of the land, on which the mill and the building, in which the boiler is, are situated, may properly be included in the description of the premises on which the lien is claimed. *Kelley* v. *Border City Mills*, 148.

2. If a mechanic's lien has attached for materials furnished, under a contract with the owner of a building, it is not defeated by a conveyance by the owner, while the contract is being performed, of the premises on which the lien is claimed; and the statement of lien is properly filed within

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thirty days after the last materials are furnished under the contract with the owner. *Gale* v. *Blaikie*, 274.

3. At the trial of a petition to enforce a mechanic's lien upon land, the owner of which has, before the filing of the certificate of lien, and with the knowledge of the petitioner, conveyed the land to another, evidence is admissible that such conveyance was fraudulent as to creditors and as to the petitioner as a creditor of the grantor, although the latter is described in the certificate as owner of the premises. *Amidon* v. *Benjamin*, 276.

4. If a person furnishes labor and materials in the erection of a building, under an entire contract for a round sum, and cannot maintain a lien for the materials for want of the notice to the owner of the land of his intention so to do, required by the Gen. Sts. *c.* 150, § 2, he cannot maintain a lien for the labor, under the St. of 1872, *c.* 318, without showing what the labor alone was worth. *Smith* v. *Emerson*, 169.

5. If a sub-contractor agrees to furnish all the hammered granite for a building for an entire sum, and has no lien for the stone, on account of his failure to give the owner the notice required by the Gen. Sts. *c.* 150, § 2, he has no lien under the St. of 1872, *c.* 318, § 1, for the labor performed in hammering the stone. *Donaher* v. *Boston*, 309.

MIDWIFE.

See ACTION, 1.

MILL.

A landowner can maintain a complaint, under the Gen. Sts. c. 149, § 34, for the reassessment by a jury of his annual damages for the flowing of his land by the respondent's dam, although such damages were not "established by a jury" as provided in that section, but by an award of arbitrators, to whom the original complaint, by agreement of parties and under rule of court, was referred, and whose award was returned into court and accepted. *Fitch* v. *Taft*, 503.

MONEY BILL.

See CONSTITUTIONAL LAW, 2; JUDGE.

MONEY HAD AND RECEIVED.

1. A., who was in the employ of a corporation, gave B. an order on the corporation for a certain sum, to be paid monthly, in specified instalments, out of his wages. The paymaster of the corporation said he would take charge of the order, and if there was no trouble about it he would pay it. As each instalment came due, B. demanded it, but was refused payment. The paymaster took the money out of A.'s wages, and put it in an envelope marked with B.'s name. No attachment was made of the money in the hands of the corporation. *Held*, that B. could not maintain an action for money had and received against the corporation. *Papineau* v. *Naumkeag Steam Cotton Co.* 372.

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2. In an action for money had and received, the plaintiff testified, against the defendant's objection, that he went to the defendant with a promissory note signed by A., and asked the defendant to get it discounted for the plaintiff's use; that the defendant produced another note for a larger amount signed by B., and said he would lend it to the plaintiff, and retain the note of A., and take the plaintiff's note for the difference in amount between the note of A. and the note of B., and hold these notes as collateral security for the loan of the note of B.; that the plaintiff assented to this proposal, and gave his note to the defendant; that the plaintiff had the note of B. discounted; that, a few days before the note of A. and the plaintiff's note became due, he learned that these notes were held by a bank; that the defendant then told him that he had used the notes, and that when the note of B., who had failed before this conversation occurred, became due, the defendant would take care of it; that the plaintiff paid all of the notes at their maturity, and offered the note of B. to the defendant, and demanded of him the money paid on the other notes. *Held*, that the defendant had no ground of exception to the admission of the plaintiff's evidence; and that, on the return of the note of B. to the defendant, the plaintiff was entitled to maintain the action. *Mayo* v. *Peterson*, 516.

See CONTRACT, 5, 6.

MONEY LENT.

See AUDITOR, 2.

MONEY PAID.

A receiptor who pays the amount of the execution issued on a judgment recovered against the debtor, after the officer has set off real estate of the debtor to the creditor in full satisfaction of the execution, cannot maintain an action against the debtor for money paid; and it is immaterial that the levy of the execution on the real estate was made under an arrangement between the receiptor and the creditor, by which the receiptor was to pay the judgment and take a deed of the land from the creditor, and that the land was afterwards sold, under a prior mortgage given by the the debtor, for less than the amount of the mortgage debt. *Woodward* v. *Munson*, 102.

MORTGAGE.

I. *Of Real Estate.*

1. The occupation of a house on mortgaged premises, by a husband and wife, the latter being the mortgagee, under an agreement between the husband and the wife's mother, who was supposed to be the owner of part of the premises, is not such a "possession of the premises" by the mortgagee, within the Gen. Sts. *c.* 140, § 15, as will entitle the mortgagor, on a bill in equity to redeem, to have the rent of the tenement applied towards the payment of the mortgage debt. *Sanford* v. *Pierce*, 146.

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2. Under the St. of 1873, *c.* 340, obliging the city of Boston to take certain lands to abate a nuisance, and providing that any person, whose land is taken, may apply for a jury, by petition to the Superior Court, to assess his damages, a mortgagee of land so taken, who is out of possession, has not such an interest in the land as to entitle him to join with the owner of the equity of redemption in the petition for a jury. *Farnsworth* v. *Boston*, 1.

3. A petition for the assessment of damages for land taken, under the St. of 1873, *c.* 340, to abate a nuisance, was filed by the owner of the equity of redemption of a lot of land so taken. Subsequently, the mortgagee filed a separate petition to have his damages assessed, and the two were ordered to be tried together. The jury estimated the value of the land at a sum less than the mortgage, and a verdict was returned for the mortgagee for the assessed value, and for the respondent on the petition of the owner of the equity of redemption, and judgment was ordered accordingly, with costs to the respondent. *Held*, on exceptions to this order, alleged by the owner of the equity of redemption, that the two petitions should not have been tried together; and that the case must stand for further proceedings. *Farnsworth* v. *Boston*, 9.

4. Under the St. of 1872, *c.* 299, authorizing the city of Cambridge to fill lands to a certain grade to abate a nuisance, and providing that any person dissatisfied with the assessment of the expense of raising his land may give notice thereof to the city, and the city shall thereupon take said land, and that the damage done by such taking may be assessed by a jury, the owner of land so taken is entitled to recover the entire value of the land taken, without any deduction on account of mortgages and liens thereon. *Read* v. *Cambridge*, 427.

See EQUITY, 6; FORCIBLE ENTRY AND DETAINER.

II. *Of Personal Property.*

See HUSBAND AND WIFE, 2; LIEN.

MOTION TO DISMISS.

See COMPLAINT, 2; POOR DEBTOR, 3.

MOTION TO QUASH.

If a jury has once been empanelled in a criminal case, it is too late, under the St. of 1864, *c.* 250, § 2, to move to quash the indictment for formal defects apparent on its face, although the motion is made before the empanelling of the jury for a new trial of the case, the former verdict having been set aside. *Commonwealth* v. *Fitchburg Railroad*, 472.

MUNICIPAL COURT.

See JUSTICE OF THE PEACE.

MURDER.

See HOMICIDE.

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NAME.

See MANDAMUS; POOR DEBTOR, 1; TRUSTEE PROCESS, 1.

NEGLIGENCE.

1. In an action for personal injuries occasioned to the plaintiff in being run over, while crossing a street, by a horse and wagon coming behind him from another street, the fact that the plaintiff does not show that he looked up and down the street before crossing is not conclusive evidence, as matter of law, that he was not in the exercise of due care. *Bowser* v. *Wellington*, 391.
2. If a person, while walking along a street in a city, hears a cry for help, and sees a man on the ground being gored by a bull, attached to him by a rope, and goes near the bull but does not attempt to assist the man, because he is afraid of the bull, and the bull attacks and injures him, the question, in an action for such injury, whether he was in the exercise of due care, is for the jury. *Linnehan* v. *Sampson*, 506.

See FRAUDULENT REPRESENTATION, 2; RAILROAD; TOWN.

NEW TRIAL.

See APPEAL, 2; COMPLAINT, 1; VERDICT, 2.

NOTICE.

See POOR DEBTOR, 1.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 2.

NUISANCE.

1. The St. of 1872, *c.* 299, authorizing the city of Cambridge to order the owners of lands to fill them to a certain grade to abate a nuisance, and providing that, on failure to comply with the order, the mayor and aldermen may raise the grade thereof, and the expense incurred shall be a lien on the land filled; that any one dissatisfied with the assessment of the expense of raising the grade may, within a certain time after notice of the same, give notice to the mayor and aldermen of his dissatisfaction, "and the city shall thereupon take said land, and shall within sixty days file in the registry of deeds" a description of the same, and a statement that it is taken under the provisions of the act; and that a person whose land is taken may have a trial by jury "to determine the damage so done him, making due allowance for the improvement by raising the grade of such land," is constitutional; and, in assessing damages, the value of the property is to be estimated as of the time when notice of the dissatisfaction with the assessment is given, and not as of the time of filing the description in the registry of deeds; and no allowance is to be made for the inconvenience suffered by the owner in consequence of the acts of the city in filling the land. *Bancroft* v. *Cambridge*, 438.

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2. The same rule applies to proceedings in Boston under the St. of 1873, c. 340. *Welch* v. *Boston*, 442, note.

3. The St. of 1872, c. 299, entitled "An Act to provide for the prevention and abatement of nuisances, and the preservation of the public health, in the cities of Cambridge and Somerville," authorizes the respective boards of mayor and aldermen in these cities to establish a grade not less than thirteen feet above mean low-water mark, and provides that such board may order the owners of lands below that grade to raise the same to such grade, and that, in case the owner of any such lands fails to comply with such order, within a certain time, the board of mayor and aldermen may raise the grade, and the expense incurred thereby shall constitute a lien on the land, "as is provided by law for the collection of taxes upon real estate, and in case of land sold for taxes." *Held*, that, after the passage of the act, although the mayor and aldermen constituted the board of health, they could not, under the Gen. Sts. c. 26, acting as such board, order a tract of such land to be filled by the owners thereof, and, on their neglect to fill it, cause the same to be filled; and that the city could not maintain an action of contract for the expense incurred thereby. *Cambridge* v. *Munroe*, 496.

See MORTGAGE, 2–4.

OBSCENE PUBLICATION.

See INDICTMENT, 7.

OFFICER.

See BOND, 2; CITY; CONSTITUTIONAL LAW, 3; EXECUTION; INTOXICATING LIQUORS, 3; SHERIFF.

OPINION OF THE JUSTICES.

See JUDGE.

ORDER.

See CONTRACT, 7.

PARTNERSHIP.

See DAMAGES; EQUITY, 2–4; TENANT IN COMMON.

PAUPER.

In an action against a town for supplies furnished J. S., a pauper, the issue was whether J. S. had acquired a settlement in the defendant town, under the St. of 1874, c. 274, by paying a tax duly assessed on his poll or estate for three years of the five years of his residence there. It appeared that in one of the three years his name was not on the valuation list, nor on the tax-list made by the assessors and delivered with the warrant to collect the same to the collector; that a clerk of the collector, without authority, and without the knowledge of the assessors until after this action was brought, added the name of J. S. to the list, and he paid a poll-tax to the

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collector, who paid it into the town treasury. *Held*, that J. S. had not been duly assessed for that year; and that the town was not estopped to deny the same. *Plymouth* v. *Wareham*, 475.

PAYMENT.

A., in good faith, borrowed money of a bank, giving his memorandum check on a third person as evidence of the amount of the loan, and delivered a certificate of stock in a corporation, with a transfer on the back and a power of attorney, signed in blank, as collateral security for the loan The bank then supposed A. to be solvent. Four days after, when the loan became due, A. paid the interest in cash, and offered, in payment of the principal, a check on a third person. The cashier of the bank, supposing that the check was drawn against funds, delivered to him the certificate of stock in the same condition in which it was received, and also delivered to him the memorandum check marked as paid. A. had at this time no funds with the person on whom the check was drawn, and had no reasonable expectations of having any to meet the check, and was in fact insolvent. Later in the day, A. redelivered the certificate of stock, but not the memorandum check, to the bank. *Held*, that the transaction did not amount to a payment of the loan; and that the bank was entitled to retain the certificate of stock as security for the loan, against the trustees of the estate of A. in bankruptcy. *Holmes* v. *First National Bank of Fall River*, 353.

See PROMISSORY NOTE, 3; VERDICT, 2.

PENSION.

See HUSBAND AND WIFE, 1.

PLEADING.

I. *Parties to Action.*

1. A trustee appointed by the Probate Court under the Gen. Sts. *c.* 43, §§ 17, 18, to receive and collect damages awarded by a city for land taken for a highway, may, after a demand and a refusal to pay, maintain an action at law against the city for the damages awarded. *Boston* v. *Robbins*, 384.

See LEASE, 1; MORTGAGE, 2.

II. *Declaration.*

See EVIDENCE, 11.

III. *Motion to Dismiss.*

See POOR DEBTOR, 3.

IV. *Answer.*

2. An answer to an action on an account annexed for use and occupation, which denies each and every allegation in the plaintiff's writ and declaration contained, puts in issue the matters alleged in the declaration. *Marson* v. *Arnold*, 399.

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3. In an action for goods sold and delivered, evidence of a usage of trade, which gives the purchaser a right to revoke the contract when the article which appears to be good is sold as good, but turns out to be rotten and nearly worthless, is not admissible under an answer which does not allege that the sale had been revoked. *Hight* v. *Bacon*, 10.

POLICE COURT.

See JUSTICE OF THE PEACE.

POLICE OFFICER.

See CONSTITUTIONAL LAW, 3; INTOXICATING LIQUORS, 3.

POLYGAMY.

An indictment, on the Gen. Sts. *c.* 165, § 4, for polygamy, alleged that the defendant, on a certain day, was lawfully married to A.; and that afterwards, on a certain day, he "did unlawfully marry and take to his wife one B., he, the defendant, then and there being married and the lawful husband of the said A., she, the said A., being his lawful wife, and living, and he, the said defendant, never having been legally divorced from the said A." It appeared in evidence that the defendant was lawfully married to A.; that afterwards she was duly divorced from him for misconduct on his part; and that he then married B. *Held*, that there was a variance between the allegations and the proof. *Commonwealth* v. *Richardson*, 34.

POOR DEBTOR.

1. A notice in writing, addressed to the creditor, giving only the initial letter of his first name, and reciting that "Henry D. Winter, debtor, arrested on an execution in your favor, desires to take the oath for the relief of poor debtors," sufficiently describes the debtor, that being his true name, although he was described in the writ, execution and recognizance as "Henry Winters." *Dwyer* v. *Winters*, 186.
2. In an action on a recognizance entered into under the Gen. Sts. *c.* 124, § 10, the declaration alleged that A. was arrested on an execution in favor of B., and entered into the recognizance declared on; that, within the thirty days, he was examined by B., who filed charges of fraud against him; that, without pleading to the charges, he requested a continuance of the case, that he might, in the mean time, have an opportunity of paying the debt, to which B. assented; that, at the request of A., the case was continued from time to time during a period of more than three years, for the same purpose; that during this period he did not submit himself to be further examined, nor did he plead to the charges against him, but at each continuance promised to pay the debt within the time for which the case was continued; and that, on a certain day, to which the case had been continued, he presented himself before the magistrate, B. not being present, having no notice that A. intended to then take the oath for the relief of poor debtors, and had the oath administered to him, and obtained

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his discharge. *Held*, on demurrer, that there was no breach of the recognizance. *O'Connell* v. *Hovey*, 310.

3. At the trial in the Superior Court of charges of fraud, under the Gen. Sts. *c.* 124, § 31, against a person applying to take the oath for the relief of poor debtors, after the reading of the copies sent up by the magistrate, the debtor moved to dismiss, assigning the reason therefor. *Held*, that the motion was seasonably made. *Clatur* v. *Donegan*, 28.

4. Charges of fraud were filed, under the Gen. Sts. *c.* 124, § 31, against a person applying to take the oath for the relief of poor debtors, the first of which alleged that since the debt was contracted or cause of action accrued, for which the debtor had been arrested, he had fraudulently conveyed, concealed, or otherwise disposed of some part of his property and estate, with a design to secure the same to his own use, or defraud his creditors. The fourth charge alleged that the debtor, on a certain day, made a conveyance of certain personal property (describing it) to a certain person, and that the conveyance was made after the debt was contracted and the cause of action accrued, for which the debtor was arrested, and with a design to secure the same to his own use, and to defraud his creditors, and that the said conveyance was made without consideration; but did not allege that the property was the property of the debtor. *Held*, that the fourth charge was in the nature of a specification under the first, and must be construed in connection with it. *Ib.*

See APPEAL, 3.

POWER.

See TRUST AND TRUSTEE, 1.

PRINCIPAL AND AGENT.

In an action against A. as indorser of a promissory note, it appeared that B., acting as the attorney of A., signed the name of the latter on the back of the note in October 1874; that, in May 1874, A. gave B. a power of attorney, which authorized him to manage A.'s property during the absence of the latter from the United States and to sign notes; that, in August 1874, A. returned to the United States and was there when the note was executed; and that, in August 1875, A., with other creditors of the maker of the note in suit, who had then become bankrupt, signed an agreement of composition under seal and received a dividend on the note from the bankrupt's estate, and agreed to save the maker of the note harmless from liability upon such notes as were signed or indorsed by each of them, having been previously informed by B. that he had signed the same in the name of A. under the power of attorney; that, after the return of A., and before the note in suit was made, other notes were signed by B. as the attorney of A., with no other authority than he then possessed under the power, which were subsequently paid by A. *Held*, that there was sufficient evidence of a ratification of B's act. *Harrod* v. *McDaniels*, 413.

See INSURANCE, 5.

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PRINCIPAL AND SURETY.

See BOND, 2, 4, 6; JUDGMENT, 3.

PROBATE COURT.

See BOND, 3–6; JUDGMENT, 2, 3; PLEADING, 1.

PROMISSORY NOTE.

1. An action against the maker of a promissory note can be maintained in the name of a person who has no beneficial interest in the note, but sues at the request of the owner; and evidence is incompetent in defence of the action which would be incompetent to impeach the title of the owner. *Spofford* v. *Norton*, 538.
2. A., a married woman, jointly and severally with her husband, signed a note in 1869, payable to B., given in renewal of a note signed in the same manner, payable to C., administrator, for land belonging to the estate of her mother conveyed by the other heirs to A. alone. The real estate of the mother had been divided by an auction sale among the heirs. C. was administrator of the estate, and acted, in the sale of the real estate, as agent for all the heirs; and immediately transferred the original note to B. and his wife, who was one of the heirs, in payment of her share of the estate. *Held*, in an action on the second note by B. against A., that the facts showed a sufficient consideration for the note; and that the addition of "administrator" to C.'s name, as payee of the original note, did not change the effect of those facts. *Plimpton* v. *Goodell*, 119.
3. In an action by a bank on a promissory note, to which the defence was payment by a sale of bonds of a corporation held as collateral security, parol evidence was admitted, against the defendant's objection, to show that the bank held the bonds also as collateral security for a previous note, of which the note in suit was a renewal or was given as security, and that, having a claim against the bankrupt estate of an indorser of the previous note, the bank made an arrangement with the assignee in bankruptcy, by which the bonds were sold by public auction, the bank agreeing to bid a certain amount for them, and to prove the balance of the claim against the estate; that no one else bid any more, and the bank kept the bonds and proved the remainder of its claim. *Held*, that this evidence was admissible. *Held*, *also*, that the fact that the bank received a dividend from the trustees of the property of the corporation, to whom a mortgage had been given to secure the bonds, was not evidence tending to show that the bonds were actually sold by the bank. *Globe National Bank* v. *Ingals*, 209.

See CONTRACT, 1; EQUITY, 3, 4; LIMITATIONS, STATUTE OF; STATUTE; VERDICT, 2.

QUO WARRANTO.

See INFORMATION.

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RAILROAD.

1. If a passenger delivers to a railroad company a trunk containing samples of merchandise belonging to a third person, whose agent he is, to be transported to a place to which he has a ticket, the only contract entered into is for the transportation of the personal baggage of the agent, and the company is not liable in contract to the owner of the trunk for its loss; nor in tort, except for gross negligence; and evidence that a large part of the defendant's business consists in transporting passengers known as commercial travellers, with trunks like the one lost, containing merchandise, that such trunks are known as sample trunks and are of special construction, and that such travellers purchase tickets for the ordinary passenger trains and receive checks for their trunks, and are transported for the price of the tickets, is immaterial. *Alling* v. *Boston & Albany Railroad*, 121.

2. A railroad corporation is not liable for running over a child who is using the track of the corporation as a playground, if the act is not done maliciously or with gross and reckless carelessness. *Morrissey* v. *Eastern Railroad*, 377.

3. If an indictment against a railroad corporation, on the Gen. Sts. *c.* 63, § 98, and the St. of 1871, *c.* 352, alleges, as the only act of negligence, that the servants of the corporation ran a locomotive engine "rashly, and without watch, care or foresight, and with great, unusual, unreasonable and improper speed," evidence is inadmissible to show that the servants neglected to ring the bell on the engine or to sound the whistle. *Commonwealth* v. *Fitchburg Railroad*, 472.

4. An indictment against a railroad corporation, on the Gen. Sts. *c.* 63, § 98, charging the killing of a person by reason of the gross negligence and carelessness of its servants while engaged in its business, by running a locomotive engine with great, unusual, unreasonable and improper speed, is not sustained by proof that, at the time of the killing, the engine was run at a high rate of speed, in the absence of evidence that the servants in so doing were acting in violation of their duty. *Ib.*

5. The St. of 1874, *c.* 372, § 163, imposing a penalty where "by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," a life is lost, applies to a case where such a corporation is using a railroad track reasonably incident to the business in which the corporation is lawfully engaged, although the track is not within the chartered limits of the corporation, or of a road then under its control, but is a private track which it is using by the mere sufferance and license of its owner. *Commonwealth* v. *Boston & Lowell Railroad*, 61.

6. At the trial of an indictment, under the St. of 1874, *c.* 372, § 163, against a railroad corporation, for killing four persons not passengers, there was evidence that three of the persons had been on an excursion in a steamboat, which, on its return at night, stopped at a pier two thousand feet long, the outer part of which was one hundred feet wide, and the part towards the shore, for the distance of thirteen hundred feet, was twenty-six feet wide and built on piles; that there were two railroad tracks on the

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pier, the rail on the east side being so near a box, three feet high, covering a water-pipe on that side, that when a train of cars was on the east track there was only a space of from five to seven inches between the box and the cars; that the three persons were seen to leave the boat and go with a crowd of persons towards the shore end of the pier; that they were again seen with the fourth person, who was the son of two of them and who had not been on the excursion, as a train of cars, which came upon the pier with great rapidity and without due warning, was rolling them round and round between the side of the cars and the box, and that their bodies were soon after found under the cars; that some persons escaped by getting on to the box, and one by hanging on the outside of the pier. *Held*, that there was sufficient evidence to warrant the jury in finding that all the persons killed were in the exercise of due care at the time of the accident. *Ib.*

See CONTRACT, 4; DEED, 3.

RATIFICATION.

See PRINCIPAL AND AGENT.

RECEIPTOR.

See MONEY PAID.

RECEIVER.

See EQUITY, 6.

RECOGNIZANCE.

The St. of 1874, *c.* 306, § 1, providing that no person arrested on a criminal charge, who is released on bail or recognizance, and makes default, shall be permitted to go at large upon further bail or recognizance in the same case, without showing reasonable excuse for such default, is constitutional; and applies to a case in which a person held on a complaint for a certain offence has entered into a recognizance to answer to any indictment that might be found against him for the same offence, and has been defaulted on such recognizance, and afterwards applies to be permitted to recognize anew. *Allen's case*, 224.

See POOR DEBTOR, 2.

RECORD.

See JOINDER OF ISSUE.

RENT.

A lessee of land, who has not paid the rent reserved in the lease, cannot maintain an action against an assignee of the lease for such rent. *Farrington* v. *Kimball*, 313.

See LANDLORD AND TENANT, 1; LEASE; MORTGAGE, 1.

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REPLEVIN.

See SALE, 3.

REPORT.

Under the Gen. Sts. *c.* 178, § 8, and the St. of 1864, *c.* 250, § 2, questions of law, arising upon a motion to quash, seasonably filed, and overruled by the Superior Court, may, after the conviction of the defendant, if in the opinion of the presiding judge they are so important or so doubtful as to require the decision of this court, be reported, at the desire or with the consent of the defendant, for its determination. *Commonwealth* v. *Byrnes*, 248.

RESERVATION.

See DEED, 3.

RETURN.

See EXECUTION.

REVIEW.

If the parties to an action file in court an agreement that judgment may be entered on a certain day, and on that day the defendant files a suggestion of his bankruptcy, which is not brought to the attention of the court until after judgment has been entered, it is within the discretion of the court, under the Gen. Sts. *c.* 146, § 21, to grant a writ of review to the defendant to enable him to set up a composition in bankruptcy as a defence. *Golden* v. *Blaskopf*, 523.

SALE.

1. If a purchaser inspects for himself the specific article sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the article, and the particular use which is to be made of it is not communicated by the purchaser at the time of the sale, there is no implied warranty on the part of the seller that the article is reasonably fit for the purpose to which it is to be applied, although the seller supposes that the purchaser intends to use it for the purpose for which he in fact buys it. *Hight* v. *Bacon*, 10.
2. If goods are sold on the condition that they shall be paid for by the promissory note of the purchaser "satisfactorily indorsed" by a third person, the taking of the note by the seller without indorsement, on the promise of the purchaser that the indorsement should be furnished, and making no subsequent demand for such indorsement, and failure to return the note, do not, as matter of law, amount to a waiver of the condition. *Kenney* v. *Ingalls*, 488.
3. In an action of replevin, if it appears that the goods in question were sold on condition that the purchaser should give a note for the price, that, though requested, he neglected for three days to give the note, and that

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the seller did not waive the condition, these facts will warrant the conclusion that the purchaser never acquired any title in the goods, and had no right to retain them against the seller; and, in such case, no demand for a return of the goods is necessary. *Salomon* v. *Hathaway*, 482.

See ASSAULT; CONTRACT, 3–6; EVIDENCE, 10; GUARANTY, 2; PLEADING, 3; VARIANCE.

SAVINGS BANK.

See TAX, 5.

SCHOOL DISTRICT.

See TAX, 3, 4.

SENATE.

See CONSTITUTIONAL LAW, 1, 2; JUDGE.

SET-OFF.

See APPEAL, 4.

SETTLEMENT.

See PAUPER.

SEWER.

An ordinance of a city, forbidding any person from entering a private drain into a public sewer, without a written permit of the board of aldermen, is valid; and no action can be maintained, either by a person who, after paying the sum assessed upon him for constructing the sewer, builds a private drain connecting with it, without a permit, or by a tenant of his heirs, for an injury caused by an overflow of the sewer through the drain, even though the overflow is caused by the negligence of the city. *Ranlett* v. *Lowell*, 431.

See ACTION, 3; DAMAGES; EQUITY, 9.

SHERIFF.

The "senior deputy sheriff in service," who, by the St. of 1877, *c.* 200, § 23, is required, in case a vacancy occurs in the office of sheriff in any county, to perform all the duties required by law to be performed by the sheriff, until the office of sheriff is filled in the manner required by law, is the deputy sheriff who has been longest in office continuously when the vacancy occurs. *Opinion of Justices*, 603.

SLANDER.

A person who utters a slander is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby render themselves liable to the person slandered. *Hastings* v. *Stetson*, 329.

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STATUTE.

The St. of 1874, *c.* 404, providing that "all persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof, shall be entitled to notice of the non-payment thereof the same as indorsers," does not apply to a note made before the passage of the statute. *Cook* v. *Googins*, 410.

See BOND, 5; MARRIED WOMAN, 3; RAILROAD, 5; WATERWORKS.

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SUPERIOR COURT.

See REPORT.

SUPREME JUDICIAL COURT.

See JUDGE; REPORT.

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SURVEYOR OF HIGHWAYS.

1. If a surveyor of highways takes stones from land laid out as a gravel and clay pit under the St. of 1869, *c.* 237, and leaves some of the stones on the highway and some on adjoining land of the person whose land is so taken, the act, if not wantonly done, and if reasonably necessary and incidental to the convenient and proper use of the gravel pit for the purposes for which it was laid out, is not a conversion for which he is liable. *Hatch* v. *Hawkes*, 177.

2. If the selectmen of a town, under the St. of 1869, *c.* 237, lay out land for a gravel and clay pit, and the owner, upon proceedings before the county commissioners for the assessment of damages, offers in evidence a claim for stones taken from the land, which is excluded, and he obtains judgment against the town for the taking of "gravel" only, which judgment is satisfied, he cannot afterwards maintain an action for the conversion of the stones against the surveyor of highways of the town, who took and used them in the repair of the highway. *Ib.*

TAX.

1. In an action against a city to recover the amount of a tax assessed on the personal property of the plaintiff on May 1, 1876, and paid under protest, there was evidence that he acquired a domicil in the town of B., which he retained until 1870; that in that year his father, with whom he had previously lived, moved to the town of N. and died in 1874; that the plaintiff, since 1870, had lived for some time each summer in a small house in N. with his brothers and sisters, which was owned by him and them, after his father's death; that, in 1872, his wife acquired a large estate in the city, with a house on it; that he had bought much land about it, and had since inhabited it exclusively except when at N.; that in this house were all his furniture, books, and pictures. The plaintiff testified that when he left B. he intended to make N. his home, and that he never intended to make the city his home. *Held*, that there was evidence to warrant a verdict for the city. *Wright* v. *Boston*, 161.

2. The deed of a collector of taxes recited that he duly demanded the payment of the tax assessed on the estate sold, and the same was not paid; that, the tax remaining unpaid after the expiration of fourteen days from the demand, he duly advertised the estate to be sold by public auction for the payment of the tax and all costs and expenses; that, the tax not being paid at the time and place appointed for the sale, he adjourned the sale to a certain day, at which time he again adjourned the sale to a certain other day, when he proceeded to sell the estate by public auction "for the discharging and payment of said tax." *Held*, that the deed sufficiently stated the cause of the sale within the requirements of the Gen. Sts. *c.* 12, § 35. *Adams* v. *Mills*, 278.

3 Under the Gen. Sts. *c.* 11, § 54, and *c.* 12, § 56, a collector of taxes who, under a warrant committed to him by the assessors of a town, distrains and sells the property of a person for a school-district tax, is not deprived of

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his justification under the warrant, by reason of the fact that, to the amount of the tax voted, the assessors have added, "for the overlaying on said tax," a sum in excess of the five per cent authorized by the Gen Sts. c. 11, § 32. *Cone* v. *Forest*, 97.

4. If a collector of taxes who, under a warrant committed to him by the assessors of a town, has distrained the property of a person for a school-district tax, knowingly sells more of it than is necessary to satisfy the tax and all charges, he is liable in tort to the owner of the property for the excess. *Ib.*

5. A savings bank is liable to the tax imposed by the Sts. of 1862, c. 224, and 1868, c. 315, one half on the average amount of deposits for the six months preceding the first day of May, and the other half on the average amount for the six months preceding the first day of November, although it is on one of those days, and has been, for more than six months preceding, temporarily prohibited by a writ of injunction, issued on the petition of the commissioners, from proceeding with its business, except in receiving and collecting money due to it, in making investments in specified securities, and in foreclosing mortgages and selling land held by foreclosure; and although it is after May 1 perpetually restrained from doing business, and receivers are appointed. *Commonwealth* v. *Barnstable Savings Bank*, 526.

See ATTACHMENT; CONSTITUTIONAL LAW, 1; DISSEISIN, 1; EQUITY, 1; EVIDENCE, 14, 15; PAUPER.

TENANT AT WILL.

See LANDLORD AND TENANT, 1.

TENANT IN COMMON.

If two persons buy a horse, each paying one half of the purchase money, under an agreement that either of them having possession of the horse shall provide for his keeping, without cost to the other, and that each shall offer the horse for sale and endeavor to procure a purchaser at a profit over his cost, but that neither shall sell the horse without the concurrence of the other, they are tenants in common of the horse, and not partners; and if a person who is neither an innkeeper nor a livery-stable keeper, with whom the horse has been placed by one part-owner, sells the horse, by authority of the latter, and without the knowledge or consent of the other owner, retaining out of the proceeds of the sale the cost of keeping the horse, paying the balance to the owner who authorized the sale, and not accounting to the other owner, and with no reservation of his half interest in the horse, it is a conversion of the latter's interest, for which an action will lie against both wrongdoers. *Goell* v. *Morse*, 480.

See DEVISE AND LEGACY, 1.

TIME.

See LANDLORD AND TENANT, 2; REVIEW.

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TOWN.

A town, which accepts a statute authorizing it to lay and maintain water-pipes for the purpose of supplying the inhabitants thereof with water, at rates established by the town, is liable for an injury sustained by a traveller upon a highway of the town which has been undermined by water escaping from the pipes by reason of negligence in their construction, although the circumstances are such that no action lies for a defect in the highway under the Gen. Sts. *c.* 44, § 22. *Hand* v. *Brookline*, 324.

See CONSTITUTIONAL LAW, 3; EMINENT DOMAIN; SURVEYOR OF HIGHWAYS; WATERWORKS.

TRESPASS.

See EASEMENT, 1; IMPOUNDING OF CATTLE.

TRIAL.

See EVIDENCE, 18.

TRUST AND TRUSTEE.

1. If property is put in trust, the income to be paid to A. for life, and the principal, after the death of A., to his executor in trust, for the use of such person or persons as A. may by will appoint, and A. executes the power, the property appointed is deemed in equity part of A.'s assets, and subject to the demand of creditors, in preference to the claims of his voluntary appointees or legatees. *Clapp* v. *Ingraham*, 200.
2. If land, held by two persons as trustees, is taken by a city for a highway, an arbitration entered into between a lessee and one of the trustees only, in accordance with which the city pays a sum of money to the lessee, is void. *Boston* v. *Robbins*, 384.

See EQUITY, 1.

TRUSTEE PROCESS.

1. In a trustee process, a duly recorded assignment of wages by the defendant is valid against an attaching creditor, under the St. of 1865, *c.* 43, § 2, although the assignment is signed by the name "Johanna Kavanagh," while the defendant's last name is in fact "Fitzgerald," and she works for the trustee under the name of "Cavan," and is generally known by that name. *O'Connor* v. *Cavan*, 117.
2. Under the Gen. Sts. *c.* 142, §§ 11, 16, 42, facts stated upon information and belief in the answers of a trustee are to be conclusively taken as true, although an adverse claimant has appeared. *Clinton National Bank* v. *Bright*, 535.

USAGE.

See PLEADING, 3.

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VARIANCE.

In an action on a written contract for the purchase of a certain number of casks of black lead to be delivered "in shipments of 100 casks per month," the declaration alleged that the lead was "to be delivered in lots of about 100 casks at different times in the year 1877." *Held*, that there was a variance between the declaration and the proof as to the description of the contract; but that the plaintiff might amend, after verdict in his favor, taking no costs since the trial. *Keller* v. *Webb*, 393.

See EMBEZZLEMENT; INDICTMENT, 5, 7; POLYGAMY.

VERDICT.

1. If an indictment in the first count charges the defendant with the forging of a certain instrument, and in the second count with being an accessory before the fact to the uttering of the instrument by another person, the offence charged in the first count is a different offence from that charged in the second count; and a verdict of acquittal on the first count and of conviction on the second count is not repugnant. *Pettes* v. *Commonwealth*, 242.

2. In an action on a note, to which the defence was payment, it appeared that the note was secured by a mortgage of a chattel. The defendant testified that he had made part payments on the note, and that the plaintiff had taken the chattel and had admitted selling it for a certain sum; and put in evidence of its value. The jury were instructed to find for the defendant, if, by the part payments and the value of the chattel, the note was paid. The jury returned a verdict for the plaintiff for a sum less than the value of the chattel according to the defendant's evidence, and stated in the verdict that they left out of their estimate the value of the chattel. *Held*, that the defendant was entitled to a new trial. *Peterson* v. *Patrick*, 395.

VOTE.

See MANDAMUS.

WAGER.

If the parties to an illegal wager deposit money with a stakeholder, and, after the wager is decided against one of the parties, he contends that he is the winner, demands the whole of the deposit, and forbids its payment to the other party, but does not demand the return of his half of the deposit, he cannot maintain an action for such half against the other party, after the stakeholder has paid the whole deposit to the winner, although the latter received it with knowledge that the plaintiff had forbidden its payment to him. *Patterson* v. *Clark*, 531.

WAGES.

See MONEY HAD AND RECEIVED, 1.

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WAIVER.

See SALE, 2, 3.

WARRANT.

See DISTRICT COURT; JUSTICE OF THE PEACE.

WARRANTY.

See SALE, 1.

WATERWORKS.

1. The St. of 1871, *c.* 245, authorized a corporation to take land for the purpose of supplying the inhabitants of a town with pure water, directed that a description of the land so taken should be filed in the registry of deeds within sixty days from such taking, provided a mode of compensation to the owners of land so taken, and authorized the town to purchase the franchise of the corporation. The St. of 1873, *c.* 242, ratified the purchase by the town of the franchise of the corporation, and contained provisions similar to those above stated. In 1872, the town entered upon and flowed a parcel of land, assuming to act under the St. of 1871, but filed no description of the land taken until after the passage of the St. of 1873. After the filing of the description, the owner of the land taken filed a petition under the St. of 1873, and was awarded damages, but the tribunal, on the objection of the town, refused to admit evidence of the damages sustained by him prior to the filing of the description. *Held*, that he was entitled to recover such damages, under the petition, and that he could not afterwards maintain an action of tort therefor. *Spaulding* v. *Arlington*, 492.
2. Under the St. of 1871, *c.* 307, authorizing the town of Woburn to take the waters of a certain pond for the purpose of supplying the inhabitants of the town with pure water, and giving the right to take land for the purpose of constructing all works necessary for the distribution of the water, and providing that the town should be liable for all damages caused by such taking and construction, the town accepted the act, took land on the shore of the pond, and there dug a water-gallery and pumping-well, and made a connection by pipes between the pumping-well and the pond, but did not use these pipes, all the water coming into the well either by percolation from the pond or from underground streams. *Held*, on a petition by a mill-owner for the assessment of damages to his water-rights, that there had been a taking of the waters of the pond within the meaning of the act; but that such taking did not necessarily include all the waters of the pond, but so much only as was required for the purposes named in the act, including the future or prospective wants of the town. *Bailey* v. *Woburn*, 416.
3. The town of Woburn has no authority, under the St. of 1871, *c.* 307, to take water to sell to other towns; and, in assessing the damages of a person whose water-rights are injured by the taking, under the act, of the

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waters of a pond, the fact that any city or town in this Commonwealth may, under the St. of 1870, *c.* 93, purchase of any aqueduct company or municipal corporation the right to take water from its source of supply, is immaterial. *Bailey* v. *Woburn*, 416.

4. If a statute, giving a town the right to take the waters of a pond for the purpose of supplying the inhabitants of the town with pure water, contains a section authorizing another town to use such water upon paying proper rates, and this section is repealed after the taking of the waters of the pond, but before any use is made of them by the other town and before the filing of a petition for damages by a person injured by the taking of the waters of the pond, such person, if entitled to any damages by reason of such right of the other town, is entitled to nominal damages only, and, if he has recovered substantial damages for the injury caused him by the taking, the fact that the right of the other town to take the water was excluded in estimating his damages is no ground for setting aside the verdict. *Ib.*

5. Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River, for the purpose of supplying the inhabitants of the town with pure water, and providing that a person injured by such taking may apply by petition to the Superior Court, and that the court may, "upon default or hearing of said town," appoint three disinterested persons to assess the damages sustained by the petitioner, their award to be final, unless either party shall demand a trial by jury, the merits of the controversy between the parties are not to be gone into at the hearing upon a motion for the appointment of commissioners; but the court is to ascertain whether a case is presented which requires the appointment of commissioners, and to determine who are suitable persons to be appointed. *Ætna Mills* v. *Waltham*, 422.

6. Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River, water-rights connected therewith, and lands necessary for the purpose of supplying the inhabitants of the town with pure water, neither the petition of a person injured by such taking nor the verdict of the jury awarding damages need allege that the town has complied with § 2 of the statute, requiring the town to file in the registry of deeds a description of the property taken. *Ib.*

7 If a town takes the waters of a stream, under a statute authorizing it so to do, for the purpose of supplying the inhabitants of the town with pure water, it is no defence to a petition for damages sustained by a person injured by such taking, that the town owned a parcel of land adjoining the stream, and that the inhabitants of the town had been accustomed, from time immemorial, to use the waters of the stream for drinking and domestic purposes. *Ib.*

8. Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River and water-rights connected therewith, for the purpose of supplying the inhabitants of the town with pure water, and providing, in § 3, that, if the owner of property taken or person sustaining damages "shall not agree on the damages to be paid therefor," he may file a petition for the assessment of his damages, the filing of a petition

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shows the election not to agree, and no previous attempt at an agreement is necessary. *Ætna Mills* v. *Waltham*, 422.

9. Under the St. of 1872, *c.* 337, authorizing the town of Waltham to take the waters of Charles River, for the purpose of supplying the inhabitants of the town with pure water, the town voted to accept the act, and to take the water from the river, to the amount of one million of gallons a day. It also dug a filtering basin on land near the river, taken under the act, pumped the water from this basin to a reservoir and distributed it to the inhabitants. A portion of the water in the basin came by percolation from the river and the rest from underground streams intercepted by the basin on their way to the river. *Held*, that there had been a taking of the waters of the river, within the meaning of the act, to the amount of one million of gallons a day; and that a person whose water-rights had been injured by such taking was entitled to recover for the injury to the market value of his property arising from the diversion of that quantity of water. *Ib.*

See Town.

WAY.

1. Evidence that a city leaves a part of a school-house lot, belonging to the city, and adjoining a highway, open and graded uniformly with the sidewalk for convenience of access to the school-house, is not sufficient to show that such part of the lot is within a footpath dedicated to the public; such open space is not "a way entering on and uniting with" the public highway, within the Gen. Sts. *c.* 43, § 83; and the city is not liable to a scholar injured by a defect therein. *Sullivan* v. *Boston*, 540.
2. Where the owner of land in fee has made a lease of the whole for years, and the lessee has assigned the lease to two persons, for the remainder of the term, before a portion of the land is taken for the alteration of a highway, whereby a part of the building is cut off, and extensive repairs made necessary, entire damages may be assessed for such taking, and be paid to a trustee, under the Gen. Sts. *c.* 43, §§ 17, 18, and need not be apportioned between the parties interested, according to §§ 53–58, although by the terms of the lease the lessee is to have the right to take down buildings on the land and erect new ones; and is to make repairs, and to give up the premises at the end of the term in good repair, and to pay all taxes and duties levied during the term; and although, by an agreement between the lessee and the assignees, the latter are to make certain repairs and improvements on the premises, to be paid for by the former, and to reconvey the lease when such payment is made; and although, at the time of the taking, the premises are sublet to tenants at will. *Boston* v. *Robbins*, 384.

See Easement, 2, 3; Eminent Domain; Judgment, 2; Pleading, 1; Surveyor of Highways; Town.

WHARF.

See Action, 3; Equity, 9.

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WILL.

Evidence that a testatrix, who, by a will dated nine months after marriage, devised all her estate to her husband, had by an antenuptial agreement reserved to her sole use certain real estate and the right to dispose of it by will, and that she had a child born a month after the will was made, will justify a finding that her omission to provide in her will for the child was intentional, and not occasioned by accident or mistake, under the Gen. Sts. *c.* 92, § 25. *Peters* v. *Siders*, 135.

WITNESS.

1. A witness, who has voluntarily testified in part on a matter tending to criminate him, cannot afterwards decline to answer a question upon the ground that it will criminate him. *Commonwealth* v. *Pratt*, 462.
2. A witness, called by one party for any purpose, may be cross-examined by the other party upon the whole case; and the limit of such cross-examination is within the discretion of the presiding judge. *Blackington* v. *Johnson*, 21.
3. A witness, who testifies in a criminal case in favor of the defendant, may be asked, on cross-examination, if he has offered a certain person money to be a surety on the defendant's bail bond. *Commonwealth* v. *Gallagher*, 54.

See EVIDENCE, 19.

WORDS.

"Earth." See *Hatch* v. *Hawkes*, 177, 182.
"Gravel." See *Hatch* v. *Hawkes*, 177, 182.
"Maintenance." See *Parker* v. *Parker*, 433, 436.
"Money bills." See *Opinions of Justices*, 549, 557 *& seq.*
"Naked." See *Commonwealth* v. *Dejardin*, 46.
"Possession." See *Sanford* v. *Pierce*, 146.
"Promissory note." See *Commonwealth* v. *Gallagher*, 54, 56; *Commonwealth* v. *Griffiths*, 252.
"Shop." See *Dunham* v. *Gannett*, 151.
"Specially authorized." See *Commonwealth* v. *Ducey*, 269, 273.

WRIT OF ENTRY.

See DISSEISIN.

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ERRORS NOTED IN PREVIOUS VOLUMES OF THIS SERIES.

Vol. CXXIV.

Page 17, 6th line from bottom, for "creditor" read "partner."
Page 516, 1st and 2d lines of head-note, for "B. made a contract" read "A. then contracted."

Vol. CXXV.

Page 425, 21st line from bottom, for "*F. W. Gillett*" read "*F. H. Gillett.*"

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